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Please let us know if you have any questions.

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Civil Action No. 1:17-cv-406-JEB

WHEREFORE, Federal Defendants respectfully request that the Court enter an order providing that Federal Defendants' response is due on May 22, 2017.

Respectfully submitted, this 12th day of April 2017.

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s/ Davené D. Walker
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Civil Action No. 1:17-cv-406-JEB
The Honorable James E. Boasberg

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MASSACHUSETTS LOBSTERMEN'S
ASSOCIATION, ATLANTIC OFFSHORE
LOBSTERMEN'S ASSOCIATION, LONG ISLAND
COMMERCIAL FISHING ASSOCIATION,
GARDEN STATE SEAFOOD ASSOCIATION, and
RHODE ISLAND FISHERMEN'S ALLIANCE,

Plaintiffs,

v.

WILBUR ROSS, BENJAMIN FRIEDMAN, RYAN
ZINKE, DONALD J. TRUMP, and JANE DOE,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL,
INC., CONSERVATION LAW FOUNDATION,
CENTER FOR BIOLOGICAL DIVERSITY, and R.
ZACK KLYVER,

Defendant-Intervenor Applicants.

Case No. 17-cv-00406 (JEB)

**DEFENDANT-INTERVENOR APPLICANTS' OPPOSITION TO FEDERAL
DEFENDANTS' MOTION FOR EXTENSION OF TIME**

Defendant-Intervenor Applicants filed a motion to intervene in this matter on March 29, 2017. *See* Mot. to Intervene (ECF No. 7). On April 12, 2017—the deadline for responses to the motion—Federal Defendants filed a request for an extension of time until May 22, 2017, to respond to Applicants' motion. *See* Mot. for Extension (ECF No. 17). While Applicants are not opposed to a reasonable extension of time,

the lengthy delay Federal Defendants have requested is unwarranted and would prejudice Applicants' interests.

The delay Federal Defendants seek, if granted, would likely prevent Applicants from participating in the first and potentially only round of merits briefing in this matter. May 22 is the deadline for Federal Defendants to file an answer or motion to dismiss. If Federal Defendants are allowed to postpone responding to Applicants' intervention motion until that same date, it is highly unlikely that intervention could be granted in time for Applicants to participate in briefing on a motion to dismiss, assuming one is filed. As explained in the intervention motion, Applicants have strong legally cognizable interests in ensuring the continued protection of the Northeast Canyons and Seamounts Marine National Monument that differ from those of Defendants, *see* Mem. in Support of Mot. to Intervene at 7-12, 20-24 (ECF No. 7-1), and Applicants' interests "might diverge [from the Federal Defendants'] during the course of litigation." *Id.* at 23 (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003)). Federal Defendants' requested extension, if granted, would inhibit Applicants' ability to participate in a stage of the proceedings that could prove dispositive.

Beyond a cursory reference to the need to review the case, Federal Defendants have offered no explanation for why the requested additional time is needed. A motion to intervene is a routine procedural motion. This Court's rules normally allow two weeks to respond to such a motion. Although Federal Defendants had not appeared at the time Applicants' motion to intervene was filed,

they were timely served, and counsel has now appeared. Federal Defendants have offered no justification for a five-and-a-half week extension on top of the two weeks this Court's rules already provided. Because an extension of that length would prejudice Applicants' interests, it should be denied.

For the foregoing reasons, Applicants request that the Court direct Federal Defendants to file a response (if any) to Applicants' intervention motion within one week of the Court's order, or such other time as will allow the Court sufficient time to rule on Applicants' intervention motion before the May 22 deadline for Federal Defendants' responsive pleading.

Dated: April 19, 2017

Respectfully submitted,

/s/ Aaron Colangelo

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Civil Action No. 1:17-cv-406-JEB

DOI-2019-08 02363

Applicants from meaningful participation in this action were intervention allowed.

Second, Intervenor-Applicants question the sufficiency of Federal Defendants' explanation for the extension. Yet, Federal Defendants have provided the Court with good cause for their request. This action is in the early stages. As stated above, Intervenor-Applicants moved to intervene before counsel for Federal Defendants appeared in the case. It is reasonable that Federal Defendants would need time to review the facts of this case and gather any necessary information before responding to the subject motion.

For the foregoing reasons, Federal Defendants respectfully request that the Court grant their motion and enter an Order extending the time for Federal Defendants' response to May 22, 2017.

Respectfully submitted, this 24th day of April 2017.

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**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MASSACHUSETTS LOBSTERMEN'S
ASSOCIATION, ATLANTIC OFFSHORE
LOBSTERMEN'S ASSOCIATION, LONG ISLAND
COMMERCIAL FISHING ASSOCIATION,
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RHODE ISLAND FISHERMEN'S ALLIANCE,

Plaintiffs,

v.

WILBUR ROSS, BENJAMIN FRIEDMAN, RYAN
ZINKE, DONALD J. TRUMP, and JANE DOE,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL,
INC., CONSERVATION LAW FOUNDATION,
CENTER FOR BIOLOGICAL DIVERSITY, and R.
ZACK KLYVER,

Defendant-Intervenor Applicants.

Case No. 17-cv-00406 (JEB)

**Reply in Support of
Defendant-Intervenor
Applicants' Motion to
Intervene**

**REPLY IN SUPPORT OF DEFENDANT-INTERVENOR APPLICANTS'
MOTION TO INTERVENE**

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INTRODUCTION

Applicants for intervention—Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and Mr. R. Zack Klyver—have presented sufficiently specific, plausible allegations in support of their motion to intervene. Plaintiffs oppose the motion, but notably, they do not dispute that Applicants have met Rule 24(a)’s four requirements for intervention as of right: Applicants filed a timely motion demonstrating that they have legally protectable interests, that those interests will be impaired if Plaintiffs prevail in this litigation, and that the existing parties may not adequately represent Applicants’ interests. Nor do Plaintiffs dispute that Applicants have met Rule 24(b)’s criteria for permissive intervention. Plaintiffs’ sole basis for opposing Applicants’ intervention is their contention that Applicants have not demonstrated standing. *See* Opp. at 2 (ECF No. 16). As explained below, Plaintiffs misconstrue D.C. Circuit standing law. Applicants’ allegations satisfy this Circuit’s standing requirements at the pleading stage.¹

¹ Federal Defendants have not yet taken a position on Applicants’ motion, and they have sought an extension of time until May 22, 2017, to respond. *See* Mot. for Extension (ECF No. 17). Per the Court’s order of April 14, 2017, Applicants are filing a separate opposition to Federal Defendants’ extension request. Applicants certainly agree that the Federal Defendants should have “an opportunity to weigh in” before the Court decides the intervention motion, Opp. at 8, and Applicants do not oppose a reasonable extension for that purpose. As explained in Applicants’ separate filing, however, the lengthy extension that Federal Defendants seek, if granted, would prejudice Applicants’ ability to participate in this litigation. If and when Federal Defendants file an opposition to Applicants’ motion to intervene, Applicants respectfully reserve the right to file a reply.

ARGUMENT

As the D.C. Circuit has held, “[i]f one [applicant-intervenor] has standing in an action, a court need not reach the issue of standing of other [applicants] when it makes no difference to the merits of the case.” *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (internal quotation marks omitted). So long as at least one of the four Applicants has adequately alleged standing, therefore, the Court should grant the motion to intervene. In fact, as explained below, all four Applicants have offered sufficient allegations regarding their standing to participate as intervenors.² Plaintiffs’ arguments to the contrary misapprehend longstanding Supreme Court and D.C. Circuit law.

I. Plaintiffs seek to impose a heightened evidentiary standard at the pleading stage that is contrary to Supreme Court and D.C. Circuit law

Plaintiffs misconstrue Supreme Court and D.C. Circuit standing law when they argue that, “[t]o establish standing,” Applicants must proffer “affidavit[s] or

² Plaintiffs incorrectly contend that the bar for standing is “even higher” for permissive intervention than for intervention as of right. Opp. at 2 n.1. In fact, it is unclear whether the D.C. Circuit would require permissive intervenors to show standing at all, see *In re Endangered Species Act Section 4 Deadline Litig.*, MDL No. 2165, 704 F.3d 972, 980 (D.C. Cir. 2013) (“It remains . . . an open question in this circuit whether Article III standing is required for permissive intervention.”), and even if permissive intervenors must show standing, there is nothing in Article III that suggests different levels of standing would be required for different types of intervenors. The case on which Plaintiffs rely, *EEOC v. National Children’s Center*, 146 F.3d 1042 (D.C. Cir. 1998), does not address standing; the passage Plaintiffs cite simply recognizes that an applicant for permissive intervention “typical[ly] . . . asks the district court to adjudicate an *additional claim* on the merits,” over which the court must have subject-matter jurisdiction. *Id.* at 1046 (emphasis added). Applicants have raised no additional claims here.

other evidence” along with their motion to intervene. Opp. at 3 (ECF No. 16). That is the standard that applies at the *summary judgment stage*—not at the pleading stage. At the pleading stage, the Supreme Court and D.C. Circuit have long held that “general factual allegations”—not evidentiary submissions—are sufficient to satisfy Article III’s standing requirements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

It is black-letter law that a party’s assertion of standing “must be supported in the same way as any other matter on which . . . [that party] bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” *Id.* at 561 (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883-89 (1990)); *accord Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we presume that general allegations embrace the specific facts that are necessary to support the claim.” *Defs. of Wildlife*, 504 U.S. at 561 (internal quotation marks and brackets omitted); *see also Osborn v. Visa Inc.*, 797 F.3d 1057, 1064 (D.C. Cir. 2015) (when assessing standing at the pleading stage, “we grant plaintiff the benefit of all inferences that can be derived from the facts alleged” (internal quotation marks and brackets omitted)). The burden on plaintiffs at this stage “is not onerous,” *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1141 n.3 (D.C. Cir. 2011), as courts look to the well-pleaded allegations in the complaint. Declarations and other evidentiary

support may be considered, but they are not required at this stage. *See, e.g., Humane Soc’y of the U.S. v. Vilsack*, 797 F.3d 4, 8-9 (D.C. Cir. 2015).³

To be sure, the burden on the party asserting standing “increases . . . as the case proceeds.” *Equal Rights Ctr.*, 633 F.3d at 1141 n.3. At summary judgment, the party asserting standing “can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true.” *Defs. of Wildlife*, 504 U.S. at 561 (internal quotation marks omitted); *accord Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015); *Equal Rights Ctr.*, 633 F.3d at 1141 n.3. This is why, in *Defenders of Wildlife*—which was decided on a motion for summary judgment—the Supreme Court held that “respondents had to submit affidavits or other evidence showing, through specific facts,” that their members faced an injury in fact. *Defs. of Wildlife*, 504 U.S. at 563.

The standing framework described above applies to intervenors just as it does to plaintiffs under this Circuit’s precedent. *See Crossroads Grassroots Policy Strategies v. Fed. Election Comm’n*, 788 F.3d 312, 316 (D.C. Cir. 2015) (“The

³ In fact, this Court recently held that although “it was necessary and reasonable for [organization]’s counsel to assure themselves that they had a good faith basis for the allegations pled in the Complaint”—including allegations that the organization “has members in the affected states, and that the interests of those members have been harmed”—the organization was not entitled to recover attorney fees for time spent drafting members’ declarations prior to filing the complaint because “written declarations *were not necessary*” at the pleading stage. *Sierra Club v. McCarthy*, -- F. Supp. 3d ----, No. 15-2264, 2017 WL 394484, at *4 (D.D.C. Jan. 27, 2017) (emphasis added; internal quotation marks omitted).

standing inquiry for an intervening-defendant is the same as for a plaintiff[.]”⁴

When deciding a motion to intervene, “there is no requirement that the district court make findings of fact and conclusions of law.” *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981). Rather, consistent with the usual approach at the pleading stage, courts assess a movant-intervenor’s standing “on the tendered pleadings”—*i.e.*, the complaint or answer in intervention—and accept all well-pleaded factual allegations as true. *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 75 (D.C. Cir. 1988); *accord Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013); *SEC v. Prudential Secs. Inc.*, 136 F.3d 153, 156 n.4 (D.C. Cir. 1998); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980); *see also* 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1914 (3d ed.) (“The pleading is construed liberally in favor of the pleader-intervenor and the court will accept as true the well-pleaded allegations in the pleading.” (footnotes omitted)). Naturally, at each successive stage of the litigation, intervenors must continue to show standing in “the manner and [with the] degree of evidence required at . . . [that] stage,” just as plaintiffs must do. *Defs. of Wildlife*, 504 U.S. at 561. At the outset of the case, however, there is no requirement that

⁴ The courts of appeals are split on the question whether a prospective intervenor must demonstrate standing in addition to meeting the requirements of Rule 24, and the Supreme Court recently granted certiorari to resolve that question. *See Town of Chester v. Laroe Estates, Inc.*, 2017 WL 125674 (U.S. Jan. 13, 2017) (No. 16-605). The Court heard oral argument in the case on April 17, 2017. This Court need not await resolution of that case, however, because Applicants have adequately pleaded standing.

intervenors come forward with evidence supporting their allegations, just as there is no such requirement for plaintiffs.

Plaintiffs here urge the Court to depart from these well settled rules and impose a heightened evidentiary standard for intervenors. *See* Opp. at 3 (arguing that “Applicant-Intervenors cannot rest on ‘mere allegations,’ but must set forth by affidavit or other evidence specific facts.”). That is not the law. Plaintiffs cite not a single case holding that, *at the pleading stage*, a party must attach declarations or other evidentiary support to its complaint or answer to prove its standing. *See id.* at 3-4.

The cases on which Plaintiffs rely are readily distinguishable. Both *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002), and *Agricultural Retailers Association v. U.S. Department of Labor*, 837 F.3d 60 (D.C. Cir. 2016), were petitions for review of agency decisions. As the D.C. Circuit has explained, where a party files a petition for review directly with the court of appeals, “[t]he petitioner’s burden of production in the court of appeals is . . . the same as that of a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing ‘by affidavit or other evidence.’” *Sierra Club*, 292 F.3d at 899 (quoting *Defs. of Wildlife*, 504 U.S. at 561); *see also Scenic Am., Inc. v. U.S. Dep’t of Transp.*, 836 F.3d 42, 49 n.2 (D.C. Cir. 2016) (because petitions for review “bypass the district court and come to us directly, we treat them as a district court would in deciding a motion for summary judgment”). Accordingly, the D.C. Circuit typically requires that a party or intervenor “set forth the basis for the claim of standing” at the same time

as it files its opening brief on appeal. Circuit Rule 28(a)(7). The rationale behind this rule is straightforward: in a petition for review, the administrative record is already set; there will be no further opportunity for factual development, nor any later stage in the proceedings when evidence of standing might be considered. *See Sierra Club*, 292 F.3d at 899. But the D.C. Circuit's treatment of standing in the petition-for-review context does not change the well settled pleading standard applicable to civil actions, like the present case, filed in district court.

Plaintiffs also rely on *Fund for Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003), *see* Opp. at 3-4, but that case expressly declined to reach the proposition that Plaintiffs urge here. In that case, a Mongolian government agency intervened defensively at the pleading stage in an action challenging the Interior Department's failure to list a species of sheep as endangered. 322 F.3d at 730-31. The Mongolian agency's intervention motion contained allegations and argument describing the agency's interest, but it was not supported by declarations. *See id.* at 733. As here, the plaintiffs opposed intervention, arguing that the agency's "standing cannot rest on 'mere allegations,'" and that its motion must be denied because it had "offered neither affidavits nor other evidence." *Id.* at 733 (quoting *Sierra Club*, 292 F.3d at 899). The D.C. Circuit rejected this argument, holding that regardless of the applicable standard, the agency's motion met it; the agency's standing was "self-evident" from the motion itself. *Id.* at 733-34.

If anything, *Fund for Animals* undercuts Plaintiffs' position. Although not necessary to the outcome, the Court questioned the plaintiffs' reliance on *Sierra*

Club and their conflation of the different procedures applicable to petitions for review and district-court actions: “We note that the above quotations from *Sierra Club* [on which plaintiffs rely] refer to a party’s obligations at the summary judgment stage, but not at the pleading stage where general factual allegations of injury may suffice.” *Fund for Animals*, 322 F.3d at 733 n.4 (internal quotation marks, ellipses, and citations omitted). Although *Fund for Animals* ultimately did not “need . . . [to] decide whether the [agency]’s motion to intervene is closer to a motion for summary judgment or to a pleading,” *id.*, decades of settled D.C. Circuit law provide the answer to that question: in the district court, a motion to intervene is assessed “on the tendered pleadings,” accepting all well-pleaded factual allegations as true. *Williams & Humbert Ltd.*, 840 F.2d at 75; *see supra* at 4-6.

Finally, Plaintiffs’ assertion that the D.C. Circuit has “upheld the denial of intervention based on the inadequacy of supporting affidavits” is misleading. *Opp.* at 3-4 (citing *Agricultural Retailers Association*, 837 F.3d at 66, and *Perciasepe*, 714 F.3d at 1324). As explained above, *Agricultural Retailers Association* involved “petitions for review” filed directly with the court of appeals, 837 F.3d at 62, so it has no bearing on the pleading standard in a civil action filed in district court. And *Perciasepe*, contrary to Plaintiffs’ suggestion, did not imply that a supporting affidavit is required at the pleading stage, or that an intervention motion is “inadequa[te]” without one. *Opp.* at 3. In fact, *Perciasepe* recognized that “we treat [an intervenor’s] factual allegations as true and must grant [it] the benefit of all inferences that can be derived from the facts alleged.” 714 F.3d at 1327. *Perciasepe*

denied intervention simply because the intervenor's assertion of standing depended on too "speculati[ve]" a causal link between the outcome of the case and the alleged future harm. *Id.* Plaintiffs have made no such argument here; nor could they. Their own complaint alleges that, but for the Monument's protections, their members would be engaging in extensive commercial fishing activities in the Monument area. *See* Complaint at ¶¶ 10-13 (ECF No. 1). And Applicants' proposed answer describes in detail the harmful impacts of such commercial fishing activities if Plaintiffs prevail in this litigation and the Monument's protections are lifted. *See* Answer at ¶¶ 80-82, 120-24.

In sum, Plaintiffs ask the Court to depart from decades of Supreme Court and D.C. Circuit law. At the pleading stage, intervenors—just like plaintiffs—must plausibly allege facts that, if proven, establish their standing. Like the other criteria for intervention, standing is assessed "on the tendered pleadings," taking all well pleaded allegations as true. *Williams & Humbert Ltd.*, 840 F.2d at 75. Plaintiffs' attempt to depart from this settled law and instead hold intervention motions at the pleading stage to a summary judgment standard—insisting on "affidavit[s] or other evidence" to demonstrate standing, *Opp.* at 5—has no support in the law.

II. Organizational Applicants have alleged standing with sufficient specificity for this stage of the proceedings

A. Parties asserting associational standing are not required to name individual members in their pleadings

Plaintiffs next argue that Organizational Applicants cannot establish associational standing unless they "identify at least one member who has individual

standing” in their motion or proposed answer. Opp. at 5. Again, Plaintiffs misstate the standard that applies at the pleading stage. There is no requirement under D.C. Circuit law that a party asserting associational standing must identify an individual member by name in its initial pleading. Such a requirement would contravene the Supreme Court’s clear holding that, in assessing standing at the pleading stage, courts must “presume that *general* allegations embrace those *specific* facts that are necessary to support the claim.” *Defs. of Wildlife*, 504 U.S. at 561 (emphasis added; internal quotation marks and brackets omitted).

Indeed, the D.C. Circuit has held that organizations asserting associational standing need not “identify particular individuals” by name in their pleadings. *Pub. Citizen v. FTC*, 869 F.2d 1541, 1551 (D.C. Cir. 1989). Applying *Defenders of Wildlife*, numerous other courts have reached the same conclusion. *See, e.g., Ass’n of Am. Physicians & Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d 19, 31 (D.D.C. 2012), *aff’d on other grounds*, 746 F.3d 468 (D.C. Cir. 2014); *Hancock Cty. Bd. of Sup’rs v. Ruhr*, 487 F. App’x 189, 198 (5th Cir. 2012); *Amnesty Int’l, USA v. Battle*, 559 F.3d 1170, 1180 (11th Cir. 2009); *Bldg. & Const. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 804 (W.D. Tex. 2015); *Equal Rights Ctr. v. Abercrombie & Fitch Co.*, 767 F. Supp. 2d 510, 527 (D. Md. 2010).

To be sure, “it will often be expedient (if not necessary) to identify particular individuals” at some point in the litigation. *Pub. Citizen*, 869 F.2d at 1551. For example, an individual member who testifies at summary judgment or at trial in

support of standing would normally have to be identified.⁵ But the *name* of a standing witness need not be pleaded, unless there is a specific reason that fact is necessary to the court’s assessment of whether the allegations plausibly assert standing. *See Pub. Citizen*, 869 F.2d at 1551-52.

Applicants acknowledge that this Court has in some instances dismissed an organization’s complaint where it did not identify individual members. *See Int’l Acad. of Oral Med. & Toxicology v. U.S. Food & Drug Admin.*, 195 F. Supp. 3d 243, 264-67 (D.D.C. 2016); *W. Wood Preservers Inst. v. McHugh*, 292 F.R.D. 145, 148 (D.D.C. 2013); *Californians for Renewable Energy v. U.S. Dep’t of Energy*, 860 F. Supp. 2d 44, 48 (D.D.C. 2012). To the extent these cases suggest that an organizational party’s initial pleading must necessarily name individual members to establish standing, such an interpretation is inconsistent with the D.C. Circuit’s decision in *Public Citizen* and with the settled pleading rules set forth in Supreme Court and D.C. Circuit precedent, as discussed above. *See supra* Section I.⁶

⁵ Even at these later stages in the litigation, however, identifying individual members may not always be necessary. For example, in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), the Supreme Court held that an organizational plaintiff’s evidence at trial was “sufficient to meet . . . [its] burden of establishing standing” even though it “did not clearly identify” individual members living in specific voting districts affected by gerrymandering. *Id.* at 1269 (internal quotation marks omitted). “At the very least,” the Court held, the district court should have given the organization “an opportunity to provide evidence of member residence” at trial if it viewed that evidence as relevant. *Id.*

⁶ For example, the chief cases on which *Californians for Renewable Energy* relies—*Summers v. Earth Island Institute*, 555 U.S. 488 (2009), and *Chamber of Commerce v. EPA*, 642 F.3d 192 (D.C. Cir. 2011)—are inapplicable at the pleading stage in district court. *Summers* was an appeal from the grant of a nationwide injunction. *See* 555 U.S. at 500 (noting that “trial is over, [and] judgment has been

Nevertheless, if the Court concludes that Applicants in the present case must identify individual members with standing at this stage, Applicants submit the attached Amended Proposed Answer, which provides the names of several individual members with standing. *See* Amended Answer at ¶¶ 95, 102-03, 108 (naming individual members). If the Court determines that Applicants must support their motion with declarations from these members, Applicants respectfully request that the Court permit them to file such declarations, and Applicants will do so promptly. *Cf. Ala. Legislative Black Caucus*, 135 S. Ct. at 1269-70.

B. Organizational Applicants’ allegations plausibly assert standing based on injuries to their members’ interests

Plaintiffs also contend that Organizational Applicants cannot establish standing because they do not point to a member who has “concrete plans to visit” the Monument area “at a[] particular time in the near future.” *Opp.* at 6; *see also id.* at 5-7. For this proposition, Plaintiffs cite only one case: *Defenders of Wildlife*. *See id.* Again, they misread that decision.

First, as explained above, the “manner and degree of evidence required” in *Defenders of Wildlife* was explicitly a function of that case’s procedural posture: it was decided on a motion for summary judgment. 504 U.S. at 561. *See also id.* at 563 (“*To survive . . . [a] summary judgment motion*, respondents had to submit affidavits or other evidence showing, through specific facts, . . . that one or more of

entered”). *Chamber of Commerce* was a petition for review filed directly at the court of appeals. 642 F.3d at 199. Neither case altered the settled law regarding “the manner and degree of evidence required” at the pleading stage in district court. *Defs. of Wildlife*, 504 U.S. at 561.

respondents' members would . . . be directly affected" by the challenged government actions (emphasis added; internal quotation marks omitted)). Reviewing the affidavits and deposition testimony, *see id.* at 563-64, the Supreme Court concluded that respondents had not demonstrated a concrete injury. The challenged government actions were occurring overseas in Egypt and Sri Lanka, and the respondents' members testified that they would be harmed by those actions *if* they traveled to Egypt and Sri Lanka in the future—but they did not testify to any specific plans to do so. *Id.* at 564. "Such 'some day' intentions," without more, did not "support a *finding* of . . . 'actual or imminent' injury," as required to survive summary judgment. *Id.* (emphasis added). Here, in contrast, the case is at the pleading stage. The Court does not make findings of fact at this stage. Instead—as *Defenders* itself stated—the Court must determine only that the "general factual allegations" make out a plausible case for standing. *Id.* at 561; *see supra* Section I.

Second, *Defenders of Wildlife* did not hold that "concrete travel plans" are a necessary prerequisite of standing in every case. The Court's insistence on "concrete plans" in *Defenders of Wildlife* made sense in the factual context of that case, where the respondents' members lived "a great distance away" from the asserted harm in Sri Lanka and Egypt, where they had only visited the affected habitat once in the past, and where they would not be "perceptibly affected by the unlawful action in question" *unless* they traveled there again. *Defs. of Wildlife*, 504 U.S. at 564-66. *See also Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 181-82, 184 (2000) (distinguishing between members' "conditional statements" about their use

or avoidance of an affected area with which they had ongoing contacts, which were sufficient to establish standing, and the “speculative ‘some day’ intentions to visit endangered species halfway around the world” in *Defenders of Wildlife*, which were not sufficient).

Here, Organizational Applicants allege that they have members with an ongoing connection to the Monument. For example, the Natural Resources Defense Council (NRDC) and the Conservation Law Foundation (CLF) have members who are scientists who presently use the Monument area for research purposes and intend to continue doing so. *See* Amended Answer at ¶¶ 95 (alleging that NRDC member Peter Auster “has visited the Monument area on numerous occasions over the past decade to conduct research,” is “currently analyzing data gathered from the Monument,” and “is actively planning a return expedition to the Monument (tentatively in 2018)”), 102-03 (alleging that CLF member Scott Kraus “has flown over the Monument area conducting aerial surveys of marine mammals,” that he “is currently involved in ongoing efforts to collect and analyze marine mammal data from . . . the Monument,” and that he “intends to continue gathering data and imagery from the Monument area . . . for purposes of advancing his research and educating the public”). These members have an interest in maintaining the Monument’s protections so that they may continue to research this unique ecosystem without disturbance by commercial fishing vessels. *See id.* at ¶¶ 95-96, 103, 105. Similarly, CLF has members who plan and participate in bird-watching excursions to the Monument area, who “want to continue planning and

participating in observation trips in the Monument,” and who have an interest in preserving an area where the seabirds they view “can forage and overwinter with minimum human disturbances.” *Id.* at ¶ 104.

These allegations of members’ ongoing connection to and use of the Monument area are sufficient to make out a plausible case for standing. The D.C. Circuit has recognized that allegations of an ongoing connection to the affected area may suffice at the pleading stage, even without specific plans to return at a particular time. *See Dearth v. Holder*, 641 F.3d 499, 503 (D.C. Cir. 2011) (U.S. citizen living in Canada who “alleges in his complaint he has many friends and relatives in the United States whom he intends to continue visiting on a regular basis,” and that he “intends to purchase firearms within the United States,” had standing to challenge firearm regulations (internal quotation marks omitted)).⁷

In addition, Organizational Applicants allege that they have other members who have not traveled to the Monument itself, but who nevertheless benefit from

⁷ Even at later stages in the proceedings, when the burden on the party asserting standing is higher, standing may still be established without proof of “concrete plans to visit” the affected area at a “particular time” in the “near future.” *Opp.* at 6. On the contrary, a demonstrated ongoing connection to an affected area may suffice. *See, e.g., Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1030-31 (D.C. Cir. 2008) (per curiam) (holding, on a petition for review, that organization’s members had standing to challenge approval of communications towers because they “engage in recreational birdwatching and research on birds in the Gulf Coast region” and migratory birds may collide with towers); *Defs. of Wildlife v. Norton*, 257 F. Supp. 2d 53, 62-63 (D.D.C. 2003) (holding, on summary judgment, that organization’s members had standing where they “work [in the affected region] on an ongoing basis . . . [or] have visited the region repeatedly and aver that they will be returning there within a period of months or a few years for study, work, and recreation”).

the Monument's protections in their use, study, and enjoyment of nearby areas. *See* Answer at ¶¶ 95, 100, 104, 108. Scientist members benefit from information gathered from the Monument that facilitates their study of the Monument's ecosystems and the impacts of climate change on the animals they study, even when that information is collected by remote operated vehicle. *See id.* at ¶¶ 95-96, 102-03, 105, 123-24. Whale- and bird-watcher members benefit from viewing migratory species (like puffins and sperm and fin whales) that rely on the Monument as an overwintering habitat, feeding ground, and migration route, even when they view these species outside the Monument's boundaries. *See id.* at ¶¶ 95-96, 104, 108, 119-22. These allegations offer an additional, independent basis for standing as explained in the following section. *See infra* at Section III.

In sum, Organizational Applicants' proposed answer plausibly alleges that their members' interests will be harmed if Plaintiffs prevail in this litigation and the Monument's protections are lifted. Nothing more is required at this stage.

III. Mr. Klyver has alleged standing with sufficient specificity for this stage of the proceedings

Turning to Mr. Klyver, Plaintiffs argue that he lacks standing to intervene because he has not traveled inside the Monument's boundaries in the past and has not alleged "concrete plan[s]" to do so in the future. Opp. at 7. In fact, Mr. Klyver is part of a team planning a trip to the Monument using a remote operated vehicle in summer 2017, *see* Amended Answer at ¶ 113, but his standing does not depend on traveling inside the Monument itself. Rather, as a professional naturalist and whale-watch guide in the northwest Atlantic, Mr. Klyver's interest is in viewing,

studying, and educating others about particular marine species “that depend[] upon the Monument as habitat and feeding ground.” *Id.* at ¶ 114.

Specifically, Mr. Klyver alleges that he has an interest in viewing, studying, and educating others about “humpback, sperm, fin, and sei whales” that travel through the Monument area, as well as “seabirds, including the population of Atlantic puffins that nest in the summer on six islands near Bar Harbor and overwinter in the Monument area.” *Id.* These migratory whale and seabird populations use the Monument area as habitat and feeding ground, but they are not confined inside the Monument’s boundaries; they also travel to areas closer to shore, where Mr. Klyver views them. *Id.* at ¶¶ 83, 114. His interest in these animal populations would be adversely affected if the Court were to rule in Plaintiffs’ favor, resulting in a re-opening of the Monument to commercial fishing and other human disturbances. *See id.* at ¶¶ 115, 120-21. As the Answer alleges, “[t]he Monument’s protections are crucial to ensuring the health of endangered, threatened, and vulnerable species like whales and puffins. . . . Re-opening the Monument to commercial fishing would decrease the likelihood of successfully viewing these species in the wild.” *Id.* at ¶ 121.

Mr. Klyver need not travel inside the Monument itself to be harmed by a ruling in Plaintiffs’ favor. This Court and others have repeatedly recognized that parties injured by the downstream or spillover effects of allegedly unlawful conduct have standing to challenge that conduct. *See, e.g., Laidlaw Envtl. Servs.*, 528 U.S. at 181-83 (plaintiffs had standing to challenge hazardous waste facility’s discharge

of pollutants into river based on effect pollutants had on aesthetic and recreational resources several miles downstream); *Sierra Club v. Jewell*, 764 F.3d 1, 6 (D.C. Cir. 2014) (organization's members who viewed battlefield from nearby roads had standing to challenge its removal from the National Register of Historic Places, even though they had no right to enter the battlefield itself); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (plaintiffs had standing to challenge development project because it would impair wildlife viewing opportunities on adjacent land). So long as the parties allege that they use an area or resource "affected by the challenged activity," that is sufficient. *Defs. of Wildlife*, 504 U.S. at 565-66 (emphasis added; internal quotation marks omitted).

For example, in a case closely analogous to the present matter, this Court rejected the government's argument that an environmental organization lacked standing to challenge military training exercises that harmed migratory birds because its member had never visited the island where the training activities took place. *See Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 171-72 (D.D.C. 2002), *vacated as moot sub nom. Ctr. for Biological Diversity v. England*, No. 02-5163, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003) (per curiam). The uninhabited island was an important breeding colony for several species of migratory birds. *Id.* at 164. Although the member had never visited the island, he regularly made bird-watching trips to neighboring islands. *Id.* at 172. Because it was "undisputed" on summary judgment "that the birds being killed and harmed by defendants' activities . . . do not stay on [the affected island], but travel to the nearby islands,"

the Court concluded that the government's action harmed the member's aesthetic and scientific interest in viewing the birds. *Id.*

Similarly, here, resuming commercial fishing activities or other extractive activities currently prohibited in the Monument could affect the populations of whales and seabirds in which Mr. Klyver has an interest. Like the uninhabited island in *Center for Biological Diversity*, the Monument's largely pristine nature makes it an important habitat for overwintering, feeding, and migration for whales and seabirds. *See Answer at ¶¶ 83, 121.* And, like the migratory birds in that case, the whales and seabirds that Mr. Kyver enjoys viewing and studying do not live in the Monument year-round. *See id.* Re-opening the Monument to commercial fishing or other commercial extractive activities, which would be the consequence of Plaintiffs' requested remedy, would likely harm these species through catch and entanglement in fishing gear, disturbance and harassment, and by depleting or otherwise adversely affecting the fish and invertebrate populations upon which the species rely while overwintering or traveling through the Monument. *See id.* ¶¶ 83, 120-22. Because these migratory species "[b]y definition . . . do not stay" in the Monument year-round, Mr. Klyver's ability to see them in the surrounding areas of the northwest Atlantic "will be diminished" if Plaintiffs succeed in obtaining the relief they seek. *Ctr. for Biological Diversity*, 191 F. Supp. 2d at 172. These allegations identify a "sufficient injury to support standing." *Id.*

IV. The Court should deny Plaintiffs' request to limit the scope of Applicants' participation in this litigation

Finally, Plaintiffs argue that if the Court grants Applicants' intervention motion, it should limit the scope of Applicants' participation in the litigation. *See* Opp. at 8. There is no cause for doing so here. As a general rule, "an intervenor participates on equal footing with the original parties to a suit." *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009) (per curiam) (internal quotation marks omitted). Applicants are committed to the efficient adjudication of this case; they do not intend to inject new claims or to burden the Court with duplicative briefing. Absent a showing that Applicants' involvement would cause "actual delays or other hardships," there is no justification for Plaintiffs' request to limit Applicants' participation. *Am. Great Lakes Ports Ass'n v. Zukunft*, No. 16-1019, 2016 WL 8608457, at *5-6 (D.D.C. Aug. 26, 2016) (denying party's request to limit scope of intervenor's participation).

CONCLUSION

For the reasons set forth above, Applicants have adequately alleged facts giving them standing in this matter. Because Plaintiffs raise no other objections relating to Applicants' intervention motion, the Court should grant the motion to intervene.

Dated: April 19, 2017

Respectfully submitted,

/s/ Aaron Colangelo

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**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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Massachusetts 02066,

ATLANTIC OFFSHORE LOBSTERMEN'S
ASSOCIATION, 221 Third Street, Newport, Rhode
Island 02840,

LONG ISLAND COMMERCIAL FISHING
ASSOCIATION, P.O. Box 191, Montauk, New York
11954,

GARDEN STATE SEAFOOD ASSOCIATION, 212
West State Street, Trenton, New Jersey 08608, and

RHODE ISLAND FISHERMEN'S ALLIANCE,
P.O. Box 337, East Greenwich, Rhode Island 02818,

Plaintiffs,

v.

WILBUR ROSS, in his official capacity as
Secretary of Department of Commerce, 1401
Constitution Avenue, N.W., Washington, D.C.
20230,

BENJAMIN FRIEDMAN, in his official capacity as
Deputy Undersecretary for Operations for the
National Oceanic and Atmospheric Administration,
1401 Constitution Avenue N.W., Room 5128,
Washington, D.C. 20230,

RYAN ZINKE, in his official capacity as Secretary
of the Department of the Interior, 1849 C Street,
N.W., Washington, D.C. 20240,

DONALD J. TRUMP, in his official capacity as
President of the United States, 1600 Pennsylvania
Avenue N.W., Washington, D.C. 20006, and

Case No. 17-cv-00406 (JEB)

**Amended [Proposed]
Answer in Intervention of
Defendant-Intervenors
Natural Resources
Defense Council,
Conservation Law
Foundation,
Center for Biological
Diversity, and R. Zack
Klyver**

JANE DOE, in her official capacity as Chairman
for the Council on Environmental Quality, 722
Jackson Place, N.W., Washington, D.C. 20506,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL,
INC., 40 West 20th Street, 11th Floor, New York,
New York 10011,

CONSERVATION LAW FOUNDATION, 62
Summer Street, Boston, Massachusetts 02110,

CENTER FOR BIOLOGICAL DIVERSITY, 378 N.
Main Avenue, Tucson, Arizona 85701, and

R. ZACK KLYVER, 25 Federal Street, Bar Harbor,
Maine 04609,

Defendant-Intervenor Applicants.

AMENDED [PROPOSED] ANSWER IN INTERVENTION

Defendant-Intervenors Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and R. Zack Klyver (collectively, Intervenor), through counsel, answer the complaint in this case dated March 7, 2017, as follows. The numbered paragraphs below correspond to the numbered paragraphs in the complaint. Intervenor deny each and every allegation in the complaint that is not specifically admitted, answered, or otherwise responded to in this Answer.

1. Admit that the Antiquities Act of 1906 authorizes the President to designate national monuments, and that the Act as originally enacted contained the quoted phrases. Deny any remaining allegations as Plaintiffs' characterization of the Antiquities Act and aver that the Act's contents are contained in the Act itself.

2. Admit that on September 15, 2016, President Obama designated an approximately 5,000 square mile area in the Atlantic Ocean 130 miles southeast of Cape Cod as the "Northeast Canyons and Seamounts Marine National Monument." Admit that the Proclamation prohibits commercial fishing within the Monument's boundaries, except for lobster and red crab fishing, which may be permitted for another seven years. Deny that this area has been "an important commercial fishery for decades." Deny the remaining allegations as Plaintiffs' characterization of the President's Proclamation and aver that the contents of the Proclamation are identified in the Proclamation itself.

3. Deny.

4. The allegations describe Plaintiffs' requested relief in this case, to which no response is required. To the extent the allegations suggest that Plaintiffs are entitled to such relief, deny.

5. The allegations state legal conclusions to which no response is required. To the extent a response is required, Intervenor's lack knowledge or information sufficient to form a belief, and therefore deny.

6. The allegations state legal conclusions to which no response is required. To the extent a response is required, admit.

7. Lack knowledge or information sufficient to form a belief, and therefore deny.

8. Lack knowledge or information sufficient to form a belief, and therefore deny.

9. Lack knowledge or information sufficient to form a belief, and therefore deny.

10. Lack knowledge or information sufficient to form a belief, and therefore deny.

11. Lack knowledge or information sufficient to form a belief, and therefore deny.

12. Lack knowledge or information sufficient to form a belief, and therefore deny.

13. Lack knowledge or information sufficient to form a belief, and therefore deny.

14. Admit.

15. Aver on information and belief that the Commerce Secretary's full name is Wilbur L. Ross, Jr. Deny the remaining allegations as Plaintiffs' characterization of the President's Proclamation and aver that the contents of the Proclamation are identified in the Proclamation itself.

16. Aver on information and belief that Benjamin Friedman is the Deputy Undersecretary for Operations for the National Oceanic and Atmospheric Administration (NOAA), and that he is performing the duties of NOAA

Administrator. Admit that Plaintiffs name Mr. Friedman as a defendant in his official capacity, and that the Proclamation charges NOAA with Monument management responsibilities. For all remaining allegations, Intervenor lack knowledge or information sufficient to form a belief, and therefore deny.

17. Deny, except admit that Ryan Zinke is the Secretary of the Interior, that Plaintiffs name Mr. Zinke as a defendant in his official capacity, and that the Secretaries of Commerce and of the Interior are required to issue a joint management plan for the Monument.

18. Lack knowledge or information sufficient to form a belief, and therefore deny. Admit that the position of Chairman for the Council on Environmental Quality is vacant.

19. Admit that Congress enacted the Antiquities Act in 1906. Deny all remaining allegations.

20. Admit that the quoted phrases appear in the Antiquities Act. Deny the remaining allegations as Plaintiffs' characterization of the Antiquities Act and aver that the Act's contents are contained in the Act itself.

21. Deny the allegations as Plaintiffs' characterization of the cited court decision and aver that its contents are contained in the decision itself.

22. Deny the allegations as Plaintiffs' characterizations of the Antiquities Act and the cited court decision, and aver that their contents are contained in the Act and the decision themselves.

23. Deny the allegations regarding the Antiquities Act and the cited court decision as Plaintiffs' characterizations of these documents, and aver that their contents are contained in the Act and the decision themselves. Deny all remaining allegations on the basis that the allegations are too vague to permit an answer or state legal conclusions to which no response is required. To the extent a response is required, deny.

24. Deny the allegations as Plaintiffs' characterization of the Antiquities Act and aver that the Act's contents are contained in the Act itself. Deny all remaining allegations.

25. The allegations state legal conclusions to which no response is required. To the extent a response is required, deny.

26. Deny all remaining allegations on the basis that the allegations are too vague to permit an answer or they state legal conclusions to which no response is required. To the extent a response is required, deny.

27. The allegations state legal conclusions to which no response is required. To the extent a response is required, deny.

28. Admit that Congress has exercised its authority to regulate in the U.S. Exclusive Economic Zone to protect the environment. Deny the remaining allegations on the basis that they are too vague to permit an answer.

29. Admit that in 1972 Congress enacted the National Marine Sanctuaries Act. Deny the remaining allegations as Plaintiffs' characterization of the Act and aver that its contents are contained in the Act itself.

30. Admit that in 1976 Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act. Deny the remaining allegations as Plaintiffs' characterization of the Act and aver that its contents are contained in the Act itself.

31. Deny that regional fishery management councils prepare an annual stock assessment for each species commercially harvested in a fishery. Deny that regional fishery management councils set an annual catch limit for every species that is overfished. Deny the remaining allegation on the basis that it is too vague to permit an answer.

32. Deny. Aver that regional fishery management councils have the authority to recommend management measures that regulate fishing gear. Deny the remainder of the allegation on the basis that it is too vague to permit an answer.

33. Deny the allegations as Plaintiffs' characterization of the referenced statutes and aver that their contents are contained in the statutes themselves.

34. Admit.

35. Admit.

36. Lack knowledge or information sufficient to form a belief regarding the allegations, and therefore deny.

37. Deny the allegations on the basis that the allegations are too vague to permit an answer.

38. Deny.

39. Deny, except admit that the area within the Monument is a rich ecosystem that supports whales, sharks, sea turtles and other species.

40. Admit the allegations in the first sentence. Deny the remaining allegations on the basis that they are too vague to permit an answer.

41. Admit.

42. Lack knowledge or information sufficient to form a belief regarding the allegations, and therefore deny.

43. Admit that the New England Fishery Management Council has jurisdiction to manage fisheries on Georges Bank. Lack knowledge or information sufficient to form a belief regarding the allegation in the second sentence, and therefore deny. Deny that the Council enforces catch limits, and deny the remaining allegations in sentence three on the basis that the allegations are too vague to permit an answer.

44. Deny the allegations in the first sentence. Lack knowledge or information sufficient to form a belief regarding the allegation in the second and third sentences, and therefore deny. Deny the remaining allegations on the basis that they are too vague to permit an answer.

45. Deny the allegations on the basis that they are too vague to permit an answer.

46. Deny the allegations on the basis that the allegations are too vague to permit an answer.

47. Lack knowledge or information sufficient to form a belief regarding the allegations, and therefore deny. Deny the allegations as Plaintiffs' characterization of the referenced letter and aver that its contents are contained in the letter itself.

48. Deny the allegations as Plaintiffs' characterization of Governor Baker's letter and aver that its contents are contained in the letter itself.

49. Lack knowledge or information sufficient to form a belief regarding the allegations, and therefore deny. Deny the allegations as Plaintiffs' characterization of the referenced letter and aver that its contents are contained in the letter itself.

50. Deny the allegations as Plaintiffs' characterization of the referenced letter and aver that the Proclamation's contents are contained in the letter itself.

51. Deny the allegations as Plaintiffs' characterization of the referenced letter and aver that the Proclamation's contents are contained in the letter itself.

52. Admit.

53. Admit.

54. Admit.

55. Admit.

56. Deny the allegations in the first sentence as Plaintiffs' characterization of the Proclamation, and aver that the Proclamation's contents are contained in the Proclamation itself. Admit that the Monument area includes sharks, whales, turtles, and highly migratory fish.

57. Deny the allegations as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself.

58. Deny the allegations as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself.

59. Admit that the Proclamation directs the Secretaries of Commerce and of the Interior to manage the Monument and prepare a joint management plan within three years of the date of the Proclamation. Deny the remaining allegations as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself.

60. Deny the allegations as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself.

61. Deny the allegations as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself.

62. Deny the allegations as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself.

63. Admit the allegation in the first sentence that the Proclamation's prohibition on commercial fishing, except for lobster and red crab, went into effect on November 14, 2016. Lack knowledge or information sufficient to form a belief regarding the remaining allegations, and therefore deny.

64. Lack knowledge or information sufficient to form a belief regarding the allegations, and therefore deny.

65. The allegation states legal conclusions to which no response is required. To the extent a response is required, deny.

66. Lack knowledge or information sufficient to form a belief regarding the allegations, and therefore deny.

67. The allegation states legal conclusions to which no response is required. To the extent a response is required, deny.

68. The allegation states legal conclusions to which no response is required. To the extent a response is required, deny.

69. The allegation states legal conclusions to which no response is required. To the extent a response is required, deny.

70. Deny the allegations as Plaintiffs' characterization of the Antiquities Act and aver that the Act's contents are contained in the Act itself.

A. The heading states legal conclusions to which no response is required. To the extent a response is required, deny.

71. Deny the allegation contained in the first sentence as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself. Deny the allegations contained in the second and third sentences.

B. The heading states legal conclusions to which no response is required. To the extent a response is required, deny.

72. Deny.

73. Deny.

74. Deny.

75. Deny the allegations contained in the first sentence. Deny the allegations contained in the remaining sentences as Plaintiffs' characterization of the Antiquities Act and the cited court decision, and aver that the Act's and the decision's contents are contained in the Act and the decision themselves.

AFFIRMATIVE DEFENSE

First Defense

The Complaint fails to state a claim upon which relief may be granted.

AVERMENTS

Intervenors aver as follows:

The Monument

76. Approximately 130 miles off the coast of Cape Cod, Massachusetts, lies a cluster of four extinct undersea volcanoes (known as seamounts) and three undersea canyons, each one deeper than the Grand Canyon, that cut into the continental shelf. The dramatic terrain of these canyons and seamounts, the current patterns and biological richness of the water column ecosystems created by these features, and a wide diversity of marine habitats all combine to generate a unique three-dimensional biologic hotspot that offers food, shelter, and nursery habitat to an exceptional range of endemic and migratory sea life in an otherwise austere environment.

77. For scientists, the area is of unique, significant, and continuing interest, populated with rare lifeforms, novel ecological relationships, and unusual geological phenomena. Although the canyons and seamount area has a storied history of scientific exploration and has been the focus of intense scientific investigation and study over the last half decade, scientists are only beginning to discover the wealth of biodiversity found here.

78. So far, scientists have found many different species of cold-water corals and other invertebrates living on the New England Seamounts and in the Atlantic canyons, including species that have been found nowhere else on earth. *See* U.S. Dep't of the Interior, "Press Release: Secretaries Pritzker, Jewell Applaud President's Designation of Northeast Canyons and Seamounts Marine National Monument" (Sept. 15, 2016), at <https://www.doi.gov/pressreleases/secretaries-pritzker-jewell-applaud-presidents-designation-northeast-canyons-and>.

79. The area also hosts endangered sea turtles, sperm and beaked whales, and numerous species of seabirds, fish, and invertebrates.

80. These deep-sea ecosystems are highly vulnerable to the types of damage caused by commercial fishing, seismic surveying, oil and gas drilling, and mining. Deep-sea organisms tend to have longer lifespans and slower growth rates than their shallow-water counterparts, making it difficult for them to recover from human disturbances.

81. One pass of a large weighted trawl net (so-called bottom trawling) scraping along a canyon wall or the lowering and retrieving of heavy offshore crab

or lobster pots, for example, can destroy corals that have been growing for hundreds or thousands of years.

82. Higher in the water column, small whales, dolphins, seabirds, and sea turtles can get caught in so-called longlines, which can extend thirty miles with thousands of hooks intended to catch swordfish and tuna.

83. The Monument is an important feeding ground for a myriad of other species including seabirds such as puffins, gulls, shearwaters, storm petrels, gannets, skuas, and terns; pelagic species including whales, dolphins, and turtles; and migratory fish such as tuna and sharks. Some of these species (such as puffins and whales) spend portions of the year feeding in or traveling through the Monument area, and they rely on the Monument area as a source of shelter and food.

84. Powerful currents created by the canyons lift nutrients to the surface, fueling plankton growth. This explosion of plankton, the base of the food chain, attracts schools of small fish and the larger animals that prey on them. The entire ecosystem from the ocean floor to the ocean surface is of great scientific interest.

85. The ruggedness of the terrain and the depth of the canyons and seamounts have so far kept these ecosystems largely out of the reach of extractive industries. For example, on information and belief, only approximately a half-dozen boats currently fish for lobsters or crabs in the Monument. However, as technology advances and the world's hunger grows for seafood, fossil fuels, and rare minerals, geography alone will not be enough to protect this area.

86. The Intervenors—together with a large coalition of stakeholders including the Pew Charitable Trusts, the Mystic and New England Aquariums, state and local political officials, over a hundred scientists, and numerous businesses, faith leaders, and recreational fishermen—called on the Obama Administration to confer permanent protection on the canyons and seamounts area.

87. There was broad support for the Monument from scientists, members of the public, coastal businesses, recreational fishermen, faith-based leaders, federal and state representatives, the region's two leading aquariums, local conservation organizations, and others.

88. Senator Richard Blumenthal and the entire Connecticut congressional delegation supported monument designation and submitted a formal proposal that encompassed seven major canyons and four seamounts.

89. The Obama Administration considered these requests for permanent protection of the canyons and seamounts, as well as opposing views, in an extensive year-long public process that included a public meeting in September 2015, several rounds of regional stakeholder meetings, including with commercial fishing interests and Intervenors, and the opportunity to submit public comments through a web portal that was available for more than a year.

90. The Obama Administration ultimately received more than 300,000 comments and letters in support of the monument designation, including letters from Intervenors.

The Intervenor

91. The Natural Resources Defense Council (“NRDC”) is a non-profit environmental membership organization with hundreds of thousands of members nationwide, including tens of thousands of members in states along the northeastern Atlantic seaboard.

92. NRDC’s mission is to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends.

93. Through its Oceans Program, NRDC has demonstrated a longstanding commitment to the protection of vulnerable marine ecosystems. For more than three decades, NRDC has advocated for the protection and long-term sustainability of our ocean resources on behalf of its members. A central part of NRDC’s mission is to protect the nation’s seas from pollution and exploitation and to conserve ocean natural treasures.

94. NRDC has worked to prevent and combat damage from extractive activities (including harmful fishing practices) in the Monument area and elsewhere in the Atlantic Ocean, and it advocated for the creation of the Monument on behalf of its members.

95. Among NRDC’s members are scientists, recreational fishermen, and bird- and wildlife-watchers who travel to, use, and enjoy the area in and around the Monument for scientific study, education, wildlife viewing, aesthetic appreciation, and recreational fishing. One such member is Peter Auster, Ph.D., a marine ecologist based in Connecticut. Dr. Auster studies marine ecosystems—including

fish, corals, and crustaceans—and the role that variations in seascape attributes play in mediating the distribution, abundance, and diversity of marine fishes and associated species. He also studies the impacts of fishing and fishing gear on marine populations, communities, and landscapes. He has visited the Monument on numerous occasions over the past decade to conduct research, including using different types of undersea exploratory vehicles, and he is currently analyzing data gathered from the Monument regarding patterns of biological diversity. He is also actively planning a return expedition to the Monument (tentatively in 2018), provided the Monument's protections remain in place, with a focus on analyzing the status of corals and associated seafloor species within the Monument boundaries and to provide a benchmark to measure change into the future. If commercial fishing resumes in the Monument, Dr. Auster will be unable to study the recovery of previously fished areas of the Monument as they begin to recover from fishing impacts. NRDC's members also use and enjoy resources outside the Monument's boundaries that benefit from its protections; for example, NRDC members who participate in whale- and bird-watching trips enjoy viewing sperm whales, migratory fish, and Atlantic puffins that rely on the Monument area for food, shelter, and migration purposes.

96. The Monument designation benefits their interests by protecting this area from the disruption and damage caused by commercial extractive activities, preserving the health, beauty, and research values of the ecosystems found here,

and enabling NRDC's members to study, view, and enjoy the Monument area and the wildlife it supports in their largely pristine state.

97. The Conservation Law Foundation is ("CLF") is a private, not-for-profit organization dedicated, *inter alia*, to protecting marine wildlife and their habitats as well as other coastal and ocean resources in New England.

98. To further these goals, CLF undertakes litigation and other legal advocacy on behalf of its members' interests; educates its members on conservation issues and on threats, challenges, and solutions to New England's oceans so that they can exercise their rights and protect their interests in those resources; promotes public awareness; education, and citizen involvement in the conservation of marine wildlife and resources; and supports programs for the conservation of marine wildlife and their habitats.

99. On behalf of its members, CLF has worked intensively in the Atlantic Ocean in the vicinity of the Monument to prevent and combat damage from extractive activities (including harmful fishing practices), and it advocated for the creation of the Monument.

100. CLF has thousands of members in New England coastal states. CLF's members use and enjoy fish and other marine resources off the New England coasts for recreational, educational, and scientific purposes.

101. CLF's members have a particular interest in landscape-scale marine protection of scientifically important places in the ocean off New England, such as the Monument, because such areas increase the ocean's resilience to the stresses

and changes associated with excessive human carbon emissions and serve as scientific reference sites.

102. CLF has members who are professional scientists who have been engaged for years in longitudinal marine resource science in the areas within and many of the animals associated with the Monument and nearby. One such member is Dr. Scott D. Kraus, whose research encompasses the study of marine mammals and the marine environment in the Monument. Dr. Kraus has flown over the Monument area conducting aerial surveys of marine mammals using the Monument, and he intends to continue gathering data and imagery from the Monument area (including data gathered by remote operated vehicle) for purposes of advancing his research and educating the public. Dr. Kraus is currently involved in ongoing efforts to collect and analyze marine mammal data from areas of the northwestern Atlantic, including the Monument, through the North Atlantic Right Whale Consortium.

103. Dr. Kraus has a strong interest in using the Monument area as a reference and control site to study the regional changes to marine wildlife associated with climate change in areas not subjected to commercial fishing and other extractive activities in order to better understand marine mammal responses to those ecosystem changes without confounding human extraction disturbances, such as commercial fishing. Dr. Kraus is a member of CLF to advance those interests consistent with CLF's mission. These interests would be harmed and adversely affected by the relief Plaintiffs seek in their complaint.

104. CLF also has members who plan paid offshore pelagic bird-watching trips to areas inside the Monument boundaries and its vicinity to observe offshore seabirds. These members' interest in these trips has been heightened by the creation of the Monument and they want to continue planning and participating in observation trips in the Monument. These members are interested in having an area where seabirds can forage and overwinter with minimum human disturbances.

105. The Monument designation benefits CLF's members' interests by protecting this area from the disruption and damage caused by commercial fishing and other commercial extractive activities, by preserving the health and beauty of the ecosystems found here for future study and scientific research, and by enabling CLF's members to study, view, and enjoy the Monument as the only large marine protected area off New England's shores.

106. The Center for Biological Diversity ("the Center") is a non-profit environmental organization whose primary mission is to ensure the long-term health and viability of animal and plant communities around the world and to protect both the natural world and humans from environmental harms.

107. The Center has devoted considerable resources to ensuring the conservation and sound management of numerous marine species threatened by destructive activities in our oceans, including unsustainable fishing practices and offshore oil and gas exploration, development, and production.

108. Center members and staff regularly use the northwest Atlantic Ocean, including areas within and near the Monument, to view and study marine wildlife,

including humpback, sperm, fin, and sei whales; loggerhead and leatherback turtles; sharks and other fish; and seabirds. For example, CBD member Thomas Armbruster is a former commercial swordfisherman and is currently a marine scientist, recreational fisherman, and educator. In 2006, Mr. Armbruster launched SandyHook SeaLife Foundation (SHSF), a not-for-profit organization with a mission to promote marine conservation with a focus on education and volunteerism. Although Mr. Armbruster has not traveled to the Monument itself, he has fished for giant swordfish over the deep sea canyons of the Northwest Atlantic, and he regularly takes expeditions to observe and study the threatened and endangered sea animals he works to conserve. Provided the Monument protections remain in place, he intends to visit the Monument to observe the migratory species that depend on its rich habitat, such as swordfish, tuna, and sharks.

109. Commercial fishing, seismic exploration, oil and gas development, and mineral extraction harm many of the marine wildlife species that Center members enjoy viewing and studying, decreasing their likelihood of viewing these species in the wild.

110. Center members and staff regularly participate in agency decision-making that affects marine life in the Atlantic Ocean. The Monument designation provides Center members and staff with the opportunity to participate in agency decision-making affecting marine life in the northwest Atlantic Ocean and with scientific information to use in their advocacy efforts, including comments on agency decision-making affecting marine life in the northwest Atlantic Ocean.

111. R. Zack Klyver is the Head Naturalist for Bar Harbor Whale Watch Co., located in Bar Harbor, Maine.

112. Mr. Klyver has guided over 3,000 trips and taken over a half million passengers to see the whales, seabirds, and other marine wildlife of the northwest Atlantic Ocean.

113. Mr. Klyver has not visited the waters within the Monument boundaries before, but he has frequently traveled to observe marine wildlife in many different parts of the northwest Atlantic and is part of a team currently planning a summer 2017 trip to the Monument with a remote operated vehicle equipped with video cameras for the purposes of observing and studying the marine animals protected there, now that the Monument has been established.

114. Mr. Klyver regularly uses the waters of the northwest Atlantic Ocean to view, study, and educate others about marine wildlife, including wildlife that depends upon the Monument as habitat and feeding ground, such as humpback, sperm, fin, and sei whales, and many seabirds, including the population of Atlantic puffins that nest in the summer on six islands near Bar Harbor and overwinter in the Monument area.

115. The Monument's protections benefit Mr. Klyver's interests in viewing, studying, and educating others about these whales and seabirds by providing them with a stable, protected source of food, shelter, and passage for their migrations and movements, reducing the negative effects of commercial fishing and other extractive

activities, and helping to ensure that they maintain healthy populations year after year. Mr. Klyver advocated for the Monument's creation on those grounds.

116. The Monument designation will also facilitate scientific investigation and therefore provide Mr. Klyver with information to use when educating the public, commenting on agency decisions and advising agency decision-makers about marine life in the northwest Atlantic Ocean, as he does frequently in his capacity as a naturalist and as a member of the Atlantic herring advisory panel for the New England Fishery Management Council.

The importance of the Monument's protections to Intervenorors and their members

117. The Monument protects the submarine canyons and seamounts and the natural resources and ecosystems in and around them from a range of destructive and harmful activities, including commercial fishing and oil, gas, or minerals exploration and development.

118. Intervenorors and their members benefit from the Monument and would be harmed by the relief Plaintiffs seek in their complaint.

119. Intervenorors and their members include individuals who want to view, study, and enjoy the aesthetic and recreational benefits of the unique habitat, corals, and other marine species protected by the Monument. The prohibition on commercial fishing and other extractive activities within the Monument protects and advances the interests of Intervenorors and their members. It enables them to use and enjoy the Monument area or resources that benefit from the Monument's

protections for their scientific, educational, aesthetic, and recreational purposes without commercial fishing and other prohibited activities impacting the natural environment or harming the marine life that they wish to study, observe, and enjoy.

120. Re-opening the Monument area to commercial fishing would result in bycatch of marine wildlife, increase vessel traffic and noise, damage fragile corals, disturb feeding and foraging seabirds and marine mammals, entangle marine mammals and other sea life in fishing gear, impair the Monument's purposes as a scientific reference site, and modify the area's ecology, such as by depleting forage fish stocks and extracting large numbers of certain fish and other species in certain locations within the Monument area.

121. The Monument's protections are crucial to ensuring the health of endangered, threatened, and vulnerable species like whales and puffins. Re-opening the Monument area to commercial fishing would harm these species by disrupting the area on which they depend for overwintering, feeding, and migration. Re-opening the area to commercial fishing could result in the deaths of individual animals and would impact the populations as a whole, reducing their availability to be viewed, studied, and enjoyed. Re-opening the Monument to commercial fishing would decrease the likelihood of successfully viewing these species in the wild.

122. As the effects of climate change and habitat destruction stress marine wildlife, the Monument plays an especially important role in ensuring the ocean's resilience and maintaining healthy fish, marine mammal, and seabird populations in nearby areas of the northwestern Atlantic Ocean.

123. The Monument's protections are also important to enabling scientific study of these ocean areas with a minimum of human disturbances. Re-opening the area to commercial fishing would interfere with scientific investigations of the canyons and seamounts.

124. Re-opening the area to commercial fishing would also make it impossible to use the Monument as a control area for comparative studies of the effects of human disturbances on fragile ecosystems. Scientists, including Intervenor's members, plan to use the Monument area to better understand the impacts of commercial fishing on similar areas and their coral colonies, and to analyze the ecological and other benefits associated with landscape-scale closed marine areas, of which the Monument is the only one in the Atlantic.

WHEREFORE, Intervenor respectfully request that the Court:

- (A) Dismiss the complaint with prejudice;
- (B) Enter judgment in favor of Defendants and Intervenor;
- (C) Decline to grant any relief to Plaintiffs; and
- (D) Grant such further relief as the Court deems just and proper.

Dated: April 19, 2017

Respectfully submitted,

/s/ Aaron Colangelo

Aaron Colangelo (D.C. Bar No. 468448)

Natural Resources Defense Council

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Counsel for CBD and Zack Klyver

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MASSACHUSETTS LOBSTERMEN'S
ASSOCIATION, ATLANTIC OFFSHORE
LOBSTERMEN'S ASSOCIATION, LONG ISLAND
COMMERCIAL FISHING ASSOCIATION,
GARDEN STATE SEAFOOD ASSOCIATION, and
RHODE ISLAND FISHERMEN'S ALLIANCE,

Plaintiffs,

v.

WILBUR ROSS, BENJAMIN FRIEDMAN, RYAN
ZINKE, DONALD J. TRUMP, and JANE DOE,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL,
INC., CONSERVATION LAW FOUNDATION,
CENTER FOR BIOLOGICAL DIVERSITY, and R.
ZACK KLYVER,

Defendant-Intervenor Applicants.

Case No. 17-cv-00406 (JEB)

**DECLARATION OF KATHERINE DESORMEAU IN SUPPORT OF
DEFENDANT-INTERVENOR APPLICANTS' AMENDED ANSWER**

I, KATHERINE DESORMEAU, state and declare as follows:

1. I am one of the attorneys for Defendant-Intervenor Applicant Natural Resources Defense Council (NRDC) in this case. I am a member in good standing of the bar of the State of California, and I have been admitted to practice in this Court

pro hac vice for this matter. I make this declaration of my own personal knowledge and, if called to testify, could and would testify as stated in this declaration.

2. Pursuant to Federal Rule of Civil Procedure 15(a)(1)(A), Defendant-Intervenor Applicants NRDC, Conservation Law Foundation, Center for Biological Diversity, and R. Zack Klyver submit the attached Amended Proposed Answer in support of their motion to intervene.

3. This Amended Proposed Answer in Intervention is identical to Defendant-Intervenor Applicants' original Proposed Answer, filed on March 29, 2017 (ECF No. 7-2), with the following exceptions: Applicants have added allegations relating to individual members with standing to Paragraphs 95, 102-03, 108, and 113.

4. In addition, Applicants have corrected errors in Paragraph 88 (changing the word "entre" to "entire"), Paragraph 121 (changing "endangered and threatened species" to "endangered, threatened, and vulnerable species"), and Paragraph 124 (changing "CLF's" to "Intervenors").

5. The paragraph numbering has not changed.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of April 2017, in San Francisco, California.

Dated: April 19, 2017

Signed,

/s/ Katherine Desormeau
Katherine Desormeau

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MASSACHUSETTS LOBSTERMEN'S
ASSOCIATION, 8 Otis Place, Scituate,
Massachusetts 02066,

ATLANTIC OFFSHORE LOBSTERMEN'S
ASSOCIATION, 221 Third Street, Newport, Rhode
Island 02840,

LONG ISLAND COMMERCIAL FISHING
ASSOCIATION, P.O. Box 191, Montauk, New York
11954,

GARDEN STATE SEAFOOD ASSOCIATION, 212
West State Street, Trenton, New Jersey 08608, and

RHODE ISLAND FISHERMEN'S ALLIANCE,
P.O. Box 337, East Greenwich, Rhode Island 02818,

Plaintiffs,

v.

WILBUR ROSS, in his official capacity as
Secretary of Department of Commerce, 1401
Constitution Avenue, N.W., Washington, D.C.
20230,

BENJAMIN FRIEDMAN, in his official capacity as
Deputy Undersecretary for Operations for the
National Oceanic and Atmospheric Administration,
1401 Constitution Avenue N.W., Room 5128,
Washington, D.C. 20230,

RYAN ZINKE, in his official capacity as Secretary
of the Department of the Interior, 1849 C Street,
N.W., Washington, D.C. 20240,

DONALD J. TRUMP, in his official capacity as
President of the United States, 1600 Pennsylvania
Avenue N.W., Washington, D.C. 20006, and

JANE DOE, in her official capacity as Chairman

Case No. 17-cv-00406 (JEB)

**Motion to Intervene in
Support of Defendants
by Applicants Natural
Resources Defense
Council, Conservation
Law Foundation,
Center for Biological
Diversity, and R. Zack
Klyver**

for the Council on Environmental Quality, 722
Jackson Place, N.W., Washington, D.C. 20506,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL,
INC., 40 West 20th Street, 11th Floor, New York,
New York 10011,

CONSERVATION LAW FOUNDATION, 62
Summer Street, Boston, Massachusetts 02110,

CENTER FOR BIOLOGICAL DIVERSITY, 378 N.
Main Avenue, Tucson, Arizona 85701, and

R. ZACK KLYVER, 25 Federal Street, Bar Harbor,
Maine 04609,

Defendant-Intervenor Applicants.

**MOTION TO INTERVENE IN SUPPORT OF DEFENDANTS
BY APPLICANTS NATURAL RESOURCES DEFENSE COUNCIL,
CONSERVATION LAW FOUNDATION,
CENTER FOR BIOLOGICAL DIVERSITY, AND R. ZACK KLYVER**

Pursuant to Federal Rule of Civil Procedure 24(a), Defendant-Intervenor-Applicants Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and Mr. R. Zack Klyver (“Applicants”) respectfully move this Court for leave to intervene as of right in the above-captioned action. In the alternative, Applicants move for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b).

Pursuant to Local Civil Rule 7(m), counsel for Applicants contacted Plaintiffs’ counsel on March 24 and 28, 2017, to ascertain their position on this motion prior to

filing. Although they corresponded, Plaintiffs' counsel has not taken a position on this motion. Counsel for Federal Defendants have not yet appeared in this case. Applicants' counsel contacted the U.S. Department of Justice on March 24 and 28, 2017, to inquire into Federal Defendants' position on this motion. Applicants' counsel spoke with a receptionist who advised that the Department had not yet assigned an attorney to this case, and therefore Applicants' counsel was unable to ascertain Federal Defendants' position on this motion.

This motion is accompanied by a supporting memorandum of law. Pursuant to Local Civil Rule 7(j), Applicants have lodged a proposed answer with their motion to intervene.

Dated: March 29, 2017

Respectfully submitted,

/s/ Aaron Colangelo

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*Privileged and confidential
Attorney-client communication and attorney work product*

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2017, I electronically filed the foregoing Motion to Intervene with the Clerk of the District Court using the CM/ECF system, which will send notification of such filing to counsel of record in this proceeding.

Dated: March 29, 2017

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**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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RHODE ISLAND FISHERMEN'S ALLIANCE,
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Plaintiffs,

v.

WILBUR ROSS, in his official capacity as
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Constitution Avenue, N.W., Washington, D.C.
20230,

BENJAMIN FRIEDMAN, in his official capacity as
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RYAN ZINKE, in his official capacity as Secretary
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DONALD J. TRUMP, in his official capacity as
President of the United States, 1600 Pennsylvania
Avenue N.W., Washington, D.C. 20006, and

JANE DOE, in her official capacity as Chairman

Case No. 17-cv-00406 (JEB)

**Memorandum of Law in
Support of Defendant-
Intervenor Applicants'
Motion to Intervene**

for the Council on Environmental Quality, 722
Jackson Place, N.W., Washington, D.C. 20506,

Defendants,

and

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CENTER FOR BIOLOGICAL DIVERSITY, 378 N.
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R. ZACK KLYVER, 25 Federal Street, Bar Harbor,
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Defendant-Intervenor Applicants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT-INTERVENOR
APPLICANTS' MOTION TO INTERVENE**

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INTRODUCTION

The Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and Mr. R. Zack Klyver (“Applicants”) seek to intervene as defendants in this case to protect their interests in the Northeast Canyons and Seamounts Marine National Monument (“the Monument”). Pursuant to Local Civil Rule 7(m), counsel for Applicants contacted Plaintiffs’ counsel on March 24 and 28, 2017, to ascertain their position on this motion prior to filing. Although they corresponded, Plaintiffs’ counsel has not taken a position on this motion. Counsel for Federal Defendants have not yet appeared in this case. Applicants’ counsel contacted the U.S. Department of Justice on March 24 and 28, 2017, to inquire into Federal Defendants’ position on this motion. Applicants’ counsel spoke with a receptionist who advised that the Department had not yet assigned an attorney to this case, and therefore Applicants’ counsel was unable to ascertain Federal Defendants’ position on this motion.

This case involves a challenge to President Obama’s lawful designation of the Northeast Canyons and Seamounts Marine National Monument, an area off the coast of Cape Cod with extraordinary scientific and ecological importance. The Monument encompasses habitat for a wide array of sea life, including endangered sperm whales, seabirds, and rare deep-sea corals, some over a thousand years old. If successful, Plaintiffs’ lawsuit would re-open this area to all commercial fishing, exposing the unique and fragile underwater ecosystems found there to irreversible damage. It could also expose this area to future impacts from offshore oil and gas

leasing and deep sea-bed mining. Applicants and their members have an interest in ensuring the continued protection of this national treasure. For the reasons set forth below, Applicants' motion to intervene should be granted.

BACKGROUND

I. The Northeast Canyons and Seamounts Marine National Monument

Approximately 130 miles off the coast of Cape Cod, Massachusetts, lies a cluster of four extinct undersea volcanoes (known as seamounts) and three undersea canyons, each one deeper than the Grand Canyon, that cut into the continental shelf. The dramatic terrain of these canyons and seamounts, the current patterns shaped by these features, the biological richness of the water column ecosystems created by these features, and a wide diversity of marine habitats all combine to generate a unique three-dimensional biologic hotspot that offers food, shelter, and nursery habitat to an exceptional range of endemic and migratory sea life in an otherwise austere environment. *See Proposed Answer at ¶ 76.* For scientists, the area is of unique, significant, and continuing interest, as it is populated with rare life forms, novel ecological relationships, and unusual geological phenomena. Although the canyons and seamount area has a storied history of scientific exploration and has been the focus of intense scientific investigation and study over the last half decade, scientists are only beginning to discover the wealth of biodiversity found here. *Id.* at ¶ 77. So far, scientists have found many different species of cold-water corals and other invertebrates living on the New England Seamounts and in the Atlantic canyons, including species that

have been found nowhere else on earth. *Id.* at ¶ 78. The area also hosts endangered sea turtles, sperm and beaked whales, and numerous species of seabirds, fish, and invertebrates. *Id.* at ¶ 79.

These deep-sea ecosystems are highly vulnerable to the types of damage caused by commercial fishing, seismic surveying, oil and gas drilling, and mining. *Id.* at ¶ 80. Deep-sea organisms tend to have longer lifespans and slower growth rates than their shallow-water counterparts, making it difficult for them to recover from human disturbances. *Id.* One pass of a large weighted trawl net (so-called bottom trawling) scraping along a canyon wall or the lowering and retrieving of heavy offshore crab or lobster pots, for example, can destroy corals that have been growing for hundreds or thousands of years. *Id.* at ¶ 81. Higher in the water column, small whales, dolphins, seabirds, and sea turtles can get caught in so-called longlines, which can extend thirty miles with thousands of hooks intended to catch swordfish and tuna. *Id.* at ¶ 82.

The Monument is an important feeding ground for a myriad of other species including seabirds such as puffins, gulls, shearwaters, storm petrels, gannets, skuas, and terns; pelagic species including whales, dolphins, and turtles; and migratory fish such as tuna and sharks. *Id.* at ¶ 83. Powerful currents created by the canyons lift nutrients to the surface, fueling plankton growth. *Id.* at ¶ 84. This explosion of plankton, the base of the food chain, attracts schools of small fish and the larger animals that prey on them. *Id.* As the effects of climate change and

habitat destruction stress these populations, the Monument plays an especially important role in ensuring the ocean's resilience. *Id.* at ¶ 122.

The ruggedness of the terrain and the depth of the canyons and seamounts have so far kept these ecosystems largely out of the reach of extractive industries. *Id.* at ¶ 85. For example, Applicants believe only approximately a half-dozen boats currently fish for lobsters or crabs in the Monument. However, as technology advances and the world's hunger grows for seafood, fossil fuels, and rare minerals, geography alone will not be enough to protect this area. *Id.*

For these reasons, the Applicants—together with a large coalition of stakeholders including the Pew Charitable Trusts, the Mystic and New England Aquariums, state and local political officials, over a hundred scientists, and numerous businesses, faith leaders, and recreational fishermen—called on the Obama Administration to confer permanent protection on the canyons and seamounts area. *Id.* at ¶¶ 86-87. Senator Richard Blumenthal and the entire Connecticut congressional delegation supported monument designation and submitted a formal proposal that encompassed seven major canyons and four seamounts. *Id.* at ¶ 88. The Obama Administration considered these requests for permanent protection of the canyons and seamounts, as well as opposing views, in an extensive year-long public process that included a public meeting in September 2015, several rounds of regional stakeholder meetings, including with commercial fishing interests and Applicants, and the opportunity to submit public comments through a web portal that was available for more than a year. *Id.* at ¶ 89. The

Obama Administration ultimately received more than 300,000 comments and letters in support of the monument designation, including letters from Applicants. *Id.* at ¶ 90.

On September 15, 2016, pursuant to his authority under the Antiquities Act, 54 U.S.C. § 320301, President Obama issued a proclamation designating the Northeast Canyons and Seamounts Marine National Monument. *See* Presidential Proclamation No. 9496, 81 Fed. Reg. 65161 (Sept. 15, 2016). The Monument encompasses the “[t]hree submarine canyons and . . . four undersea mountains . . . in the waters approximately 130 miles southeast of Cape Cod.” *Id.* at 65161. In response to fishing industry input and in order to leave out more active fishing areas, the Monument contained only 40 percent of the total canyon and inter-canyon area, and it encompassed four fewer major canyons than did the Connecticut delegation’s proposal. The Proclamation describes in detail “the canyons and seamounts themselves, and the natural resources and ecosystems in and around them,” which it identifies as “objects of historic[al] and scientific interest.” *Id.* The Proclamation incorporates a map identifying the approximately 4,913-square-mile area reserved in the Monument, which the President determined constitutes “the smallest area compatible with the proper care and management of the objects to be protected.” *Id.* at 65163. The Monument is the first and only marine national monument off the continental United States, although it is not the only marine

monument; Presidents George W. Bush and Obama also designated monuments and monument expansions in the Pacific Ocean.¹

President Obama's Proclamation confers crucial protections and use restrictions on the Monument. It directs the Secretary of Commerce (through the National Oceanic and Atmospheric Administration) and the Secretary of the Interior (through the U.S. Fish and Wildlife Service) to "share management responsibility for the monument," 81 Fed. Reg. at 65164, and it directs the Secretaries to "prohibit" a range of destructive activities, including "[e]xploring for, developing, or producing oil and gas or minerals," *id.* at 65164, and "[f]ishing commercially," *id.* at 65165 (emphasis added). Fishing for American lobster and red crab, however, may continue for seven years to allow a transition period for participants in these fisheries. *Id.* The Secretaries must prepare a joint management plan "within 3 years of the date of this proclamation." *Id.* at 65164. The use restrictions have gone into effect, with the ban on oil and gas exploration becoming effective immediately, *id.*, and the ban on commercial fishing becoming effective after 60 days. *See* ECF No. 1, Complaint at ¶ 63 ("On November 14, 2016, the proclamation's prohibition against all fishing in the area except for lobster and

¹ *See* Pres. Proc. No. 9478, Papahānaumokuākea Marine National Monument Expansion, 81 Fed. Reg. 60227 (Aug. 26, 2016); Pres. Proc. No. 9173, Pacific Remote Islands Marine National Monument Expansion, 79 Fed. Reg. 58645 (Sept. 25, 2014); Pres. Proc. No. 8337, Establishment of the Rose Atoll Marine National Monument, 74 Fed. Reg. 1577 (Jan. 6, 2009); Pres. Proc. No. 8336, Establishment of the Pacific Remote Islands Marine National Monument, 74 Fed. Reg. 1565 (Jan. 6, 2009); Pres. Proc. No. 8335, Establishment of the Marianas Trench Marine National Monument, 74 Fed. Reg. 1557 (Jan. 6, 2009); Pres. Proc. No. 8031, Establishment of the Northwestern Hawaiian Islands Marine National Monument, 71 Fed. Reg. 36443 (June 15, 2006).

red crab went into effect.”). NOAA is currently developing proposed implementing regulations for the commercial fishing prohibitions.

II. Plaintiffs’ complaint

On March 7, 2017, Plaintiffs filed their complaint. All five plaintiffs are commercial fishing industry groups who allege their members’ business interests have been or will be harmed by the creation of the Monument. They seek a declaration that “the Antiquities Act does not authorize the President to establish ocean monuments and that the . . . Monument is consequently unlawful,” as well as an injunction “forbidding the [federal defendants] . . . from enforcing any of the proclamation’s fishing prohibitions.” Complaint at 16 (Request for Relief). The litigation is currently in its earliest stage; as of the date of this filing, Federal Defendants’ counsel have not yet appeared, and no responsive pleadings or motions (except pro hac vice motions) have been filed.

III. Applicants for intervention

Three of the undersigned Applicants for intervention are environmental non-profit organizations whose members’ interests would be harmed if the Court were to grant Plaintiffs the relief they seek. The fourth Applicant for intervention is a professional naturalist whose own interests would be harmed if the Court granted Plaintiffs the relief they seek.

The Natural Resources Defense Council (“NRDC”) is a non-profit environmental membership organization with hundreds of thousands of members nationwide, including tens of thousands of members in states along the

northeastern Atlantic seaboard. *See* Proposed Answer at ¶ 91. NRDC's mission is to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends. *Id.* at ¶ 92. For more than three decades, NRDC has advocated for the protection and long-term sustainability of our ocean resources on behalf of its members. A central part of NRDC's mission is to protect the nation's seas from pollution and exploitation and to conserve ocean natural treasures. *Id.* at ¶ 93. NRDC advocated for the creation of the Monument on behalf of its members. *Id.* at ¶ 94.

Among NRDC's members are scientists, recreational fishermen, and bird- and wildlife-watchers who travel to, use, and enjoy the area in and around the Monument for scientific study, education, wildlife viewing, aesthetic appreciation, and recreational fishing. *Id.* at ¶ 95. The Monument designation benefits their interests by protecting this area from the disruption and damage caused by commercial extractive activities, preserving the health, beauty, and research values of the ecosystems found here, and enabling NRDC's members to study, view, and enjoy the Monument area and the wildlife it supports in their largely pristine state. *Id.* at ¶ 96. NRDC's members also use and enjoy resources outside the Monument's boundaries that benefit from its protections; for example, NRDC members who participate in whale- and bird-watching trips enjoy viewing sperm whales and Atlantic puffins that rely on the Monument area for food, shelter, and migration purposes. *Id.* at ¶ 95.

The Conservation Law Foundation is (“CLF”) is a private, not-for-profit organization dedicated, *inter alia*, to protecting marine wildlife and their habitats as well as other coastal and ocean resources in New England. *Id.* at ¶ 97. To further these goals, CLF undertakes litigation and other legal advocacy on behalf of its members’ interests; educates its members on conservation issues and on threats, challenges, and solutions to New England’s oceans so that they can exercise their rights and protect their interests in those resources; promotes public awareness; education, and citizen involvement in the conservation of marine wildlife and resources; and supports programs for the conservation of marine wildlife and their habitats. *Id.* at ¶¶ 98-99.

CLF has thousands of members in New England coastal states. *Id.* at ¶ 100. CLF’s members use and enjoy fish and other marine resources off the New England coasts for recreational, educational, and scientific purposes. *Id.* CLF’s members have a particular interest in landscape-scale marine protection of scientifically important places in the ocean off New England, such as the Monument, because government agencies have determined that such areas increase the ocean’s resilience to the stresses and changes associated with excessive human carbon emissions and serve as scientific reference sites. *Id.* at ¶ 101. CLF has members who are professional scientists who have been engaged for years in longitudinal marine resource science in the areas within the Monument or with the animals associated with the Monument and nearby. *Id.* at ¶ 102. At least one of CLF’s members has a professional interest in using the Monument area as a reference and

control site to study the regional changes to marine wildlife associated with climate change in areas not subjected to commercial fishing and other extractive activities. *Id.* at ¶ 103.

CLF also has members who plan paid offshore pelagic bird-watching trips to areas inside the Monument boundaries and its vicinity to observe offshore seabirds. *Id.* at ¶ 104. These members' interest in these trips has been heightened by the creation of the Monument and they want to continue planning and participating in observation trips in the Monument. *Id.* These members are interested in having an area where seabirds can forage and overwinter with minimum human disturbances. *Id.* The Monument designation benefits CLF's members' interests by protecting this area from the disruption and damage caused by commercial fishing and other commercial extractive activities, by preserving the health and beauty of the ecosystems found here for future study and scientific research, and by enabling CLF's members to study, view, and enjoy the Monument as the only large marine protected area off New England's shores. *Id.* at ¶ 105.

The Center for Biological Diversity ("the Center") is a non-profit environmental organization whose primary mission is to ensure the long-term health and viability of animal and plant communities around the world and to protect both the natural world and humans from environmental harms. *Id.* at ¶ 106. The Center has devoted considerable resources to ensuring the conservation and sound management of numerous marine species threatened by destructive activities

in our oceans, including unsustainable fishing practices and offshore oil and gas exploration, development, and production. *Id.* at ¶ 107.

Center members and staff regularly use the northwest Atlantic Ocean, including areas within and near the Monument, to view and study marine wildlife, including humpback, sperm, fin, and sei whales; loggerhead and leatherback turtles; sharks and other fish; and seabirds. *Id.* at ¶ 108. Commercial fishing, seismic exploration, oil and gas development, and mineral extraction harm many of the marine wildlife species that Center members enjoy viewing and studying, decreasing their likelihood of viewing these species in the wild. *Id.* at ¶ 109. The Monument's protections will reduce these harmful practices in the northwest Atlantic Ocean and thereby benefit the Center's members. Additionally, Center members and staff regularly participate in agency decision-making that affects marine life in the Atlantic Ocean. The Monument designation provides Center members and staff with the opportunity to participate in agency decision-making affecting marine life in the northwest Atlantic Ocean and with scientific information to use in their advocacy efforts, including comments on agency decision-making affecting marine life in the northwest Atlantic Ocean. *Id.* at ¶ 110.

R. Zack Klyver is the Head Naturalist for Bar Harbor Whale Watch Co., located in Bar Harbor, Maine. *Id.* at ¶ 111. Mr. Klyver has guided over 3,000 trips and taken over a half million passengers to see the whales, seabirds, and other marine wildlife of the northwest Atlantic Ocean. *Id.* at ¶ 112. He has traveled to observe marine wildlife in many different areas of the northwest Atlantic Ocean

and is considering making a trip to the Monument now that it has been established. *Id.* at ¶ 113. He regularly uses the waters of the northwest Atlantic Ocean to view, study, and educate others about marine wildlife, including wildlife that depends upon the Monument as habitat and feeding ground, such as humpback, sperm, fin, and sei whales, and many seabirds, including the population of Atlantic puffins that nest in the summer on six islands near Bar Harbor and overwinter in the Monument area. *Id.* at ¶ 114. The Monument's protections benefit Mr. Klyver's interests in viewing, studying, and educating others about whales and seabirds by providing those species with a stable, protected source of food, shelter, and passage for their migrations and movements, reducing the negative effects of commercial fishing and other extractive activities, and helping to ensure that they maintain healthy populations year after year. *Id.* at ¶ 115. The Monument designation will also facilitate scientific investigation and therefore provide Mr. Klyver with information to use when educating the public, commenting on agency decisions and advising agency decision-makers about marine life in the northwest Atlantic Ocean, as he does frequently in his capacity as a naturalist and as a member of the Atlantic herring advisory panel for the New England Fishery Management Council. *Id.* at ¶ 116.

ARGUMENT

The Applicants seek leave to intervene as defendants to protect their own and their members' scientific, aesthetic, and recreational interests in maintaining the Monument's protections. As explained below, all four Applicants have standing to

intervene as defendants in this lawsuit, and they meet the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a) or, alternatively, the broad standard for permissive intervention under Rule 24(b).

I. Applicants have standing to intervene as defendants

As an initial matter, Applicants have standing to intervene in this action as D.C. Circuit law requires. *See Crossroads Grassroots Policy Strategies v. Fed. Election Comm’n*, 788 F.3d 312, 316, 320 (D.C. Cir. 2015). Organizational Applicants—NRDC, CLF, and the Center—all assert standing through their members. *See* Section I(A), *infra*. Mr. Klyver asserts standing in his own right. *See* Section I(B), *infra*.

Standing to intervene, like other aspects of intervention, “should be viewed on the tendered pleadings.” *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 75 (D.C. Cir. 1988). At the pleading stage, the allegations in the proposed complaint- or answer-in-intervention must be accepted as valid. *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980); *see also Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) (in assessing defendant-intervenor’s standing, the court “treat[s] [the defendant-intervenor’s] factual allegations as true and must grant [the defendant-intervenor] the benefit of all inferences that can be derived from the facts alleged” (internal quotation marks omitted)); 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1914 (3d ed.) (“The proposed pleading must state a good claim for relief or a good defense. . . . The pleading is construed liberally in favor of the pleader-intervenor and the court

will accept as true the well-pleaded allegations in the pleading.” (footnotes omitted)). Applicants’ averments in the proposed answer-in-intervention, filed concurrently with this motion, are sufficient to establish their standing.

A. Organizational Applicants

Each Organizational Applicant asserts standing through its members, which requires the Applicant to establish (1) that at least one of its “members would . . . have standing to sue in [her] own right,” (2) that “the interests at stake are germane to the organization’s purpose[s],” and (3) that “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Organizational Applicants have satisfied these requirements.

First, the proposed answer alleges that Organizational Applicants’ members would have standing to sue in their own right because (a) they face a concrete and particularized “injury in fact” that is likely to occur if Plaintiffs achieve the remedies they seek in this lawsuit, (b) the injury is “fairly traceable” to the remedies Plaintiffs seek, and (c) it is “likely that a decision favorable to the [Applicants] would prevent that loss from occurring.” *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (approving of intervention where defendant-intervenors asserted that plaintiff’s proposed remedy would cause them harm); *see also Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (same); *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 11-13 (D.D.C. 2016) (same).

As averred in the proposed answer, the Monument's protected status benefits Organizational Applicants' members in specific and concrete ways. The ban on commercial fishing and other commercial marine extractive activities enables them to use and enjoy the Monument area for their scientific, educational, aesthetic, and recreational purposes in its largely pristine state, without commercial fishing, oil and gas seismic exploration, drilling, or mining activities disrupting the natural environment or damaging the coral colonies and other marine life. Proposed Answer at ¶¶ 95-96, 100-05, 108-10, 117-19, 121, 123-24.

For example, Organizational Applicants' members have traveled to areas in and around the Monument to view, study, and otherwise enjoy its sea life and underwater formations in the past, and they wish to continue doing so in the future with the Monument's protections in place. *Id.* at ¶¶ 95-96, 102-05, 108-10, 118-19. Organizational Applicants' members also view, study, and enjoy wildlife that depends upon the Monument area as a feeding ground, migration route, or overwintering area; for example, members who engage in bird-watching and whale-watching in certain other areas benefit from the Monument because its protections help ensure the health and stability of the whale and seabird populations they enjoy observing. *Id.* at ¶¶ 83, 95, 104, 108, 121.

A decision by this Court to revoke or weaken the Monument's protections and open all or part of the area to commercial fishing or other disruptive commercial activities would directly harm Organizational Applicants' members' interests. Allowing commercial fishing in the Monument would result in bycatch of marine

wildlife, increase vessel traffic and noise, damage fragile corals, disturb feeding and foraging seabirds and marine mammals, entangle marine mammals and other sea life in fishing gear, impair the Monument's purposes as a scientific reference site, and modify the area's ecology, such as by depleting forage fish stocks and extracting large numbers of certain fish and other species in certain locations within the Monument area. *Id.* at ¶¶ 80-82, 109, 120. Organizational Applicants' members who are scientists would be specifically harmed by no longer being able to undertake the comparative studies they have planned to better understand the impacts of commercial fishing on these areas and their coral colonies, and to analyze the ecological and other benefits associated with landscape-scale closed marine areas, of which the Monument is the only one in the Atlantic. *Id.* at ¶¶ 80-82, 120, 123-24 (describing harms caused by commercial fishing); *cf.* Complaint at ¶¶ 10-13 (alleging that, but for the Monument designation, plaintiffs' members would be engaging in extensive commercial fishing activities in the Monument area).

Organizational Applicants have adequately alleged that their members "will be injured in fact by the setting aside" of the Monument designation. *Forest Cty.*, 317 F.R.D. at 11 (internal quotation marks omitted). Plaintiffs' requested remedy would re-open the Monument to commercial fishing, which would harm Organizational Applicants' members' "concrete interests in appreciating and studying the aesthetic features and [scientific] significance of a preserved and intact [Monument]." *Sierra Club v. Jewell*, 764 F.3d 1, 6 (D.C. Cir. 2014) (holding that organizations had standing to challenge removal of site from the National Register

of Historical Places); *cf. Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (plaintiff organizations “undoubtedly have alleged a sufficient ‘injury in fact’ in that the whale[-]watching and studying of their members will be adversely affected by continued whale harvesting”).

Moreover, because these harms “suffice[] for standing purposes,” causation and redressability “rationally follow[.]” *Crossroads*, 788 F.3d at 316. The injuries described above are “directly traceable” to the outcome of this lawsuit and are redressable by a decision of this Court denying Plaintiffs’ requested relief. *See id.* Organizational Applicants have therefore established that their members would have standing to sue in their own right.

Second, protecting their members’ scientific, educational, aesthetic, and recreational interests in safeguarding the Monument area from the harms of commercial extractive activities is “germane” to Organizational Applicants’ missions. *See Friends of the Earth*, 528 U.S. at 181. As described in the proposed answer, all three Organizational Applicants’ missions include the goal of preserving healthy ocean ecosystems for the edification and enjoyment of all people, and preventing the harmful effects of extractive industries on fragile ocean communities. *See Proposed Answer* at ¶¶ 92-94, 97-99, 106-07. All three Organizational Applicants have worked intensively in the Atlantic Ocean in the vicinity of the Monument to prevent damage to these areas from extractive activities (including harmful fishing practices), *see id.*, and NRDC and CLF both

advocated for the creation of the Monument. *See id.* at ¶¶ 94, 99. Organizational Applicants' participation in this lawsuit is directly related to their missions.

Third, the relief Organizational Applicants seek does not require that their individual members participate in this litigation. Applicants ask the Court to dismiss the complaint and deny Plaintiffs' requests for relief. There is no need for Organizational Applicants' individual members to appear on their own behalf in this litigation.

B. Mr. Klyver

Mr. Klyver has standing to participate in this lawsuit in his own right. As a naturalist who regularly observes, studies, and educates others about the ecology and sea life in the northwest Atlantic Ocean, he has a direct interest in maintaining the Monument's protections—particularly because of their importance to the whale species and puffins on which he focuses his activities. *See* Proposed Answer at ¶¶ 114-15. The Monument's protections are crucial to ensuring the health of these endangered and threatened species and their availability to be viewed, studied, and enjoyed. *Id.* at ¶ 83. Re-opening the Monument to commercial fishing, as Plaintiffs request, would harm the marine wildlife that Mr. Klyver enjoys viewing, studying, and educating others about in his personal and professional capacities, decreasing the likelihood of successfully viewing these species in the wild and his ability to enjoy and educate others about them. *Id.* at ¶¶ 115, 120-22.

Like Organizational Applicants' members, Mr. Klyver has alleged "concrete interests in appreciating and studying the aesthetic features and [scientific]

significance of a preserved and intact [Monument],” *Jewell*, 764 F.3d at 6, and those interests would be harmed by the relief Plaintiffs seek if they are successful in this litigation. *Cf. Japan Whaling Ass’n*, 478 U.S. at 230 n.4; *Ctr. for Biological Diversity v. Blank*, 933 F. Supp. 2d 125, 137 (D.D.C. 2013). Like Organizational Applicants, Mr. Klyver has alleged a harm that is traceable to the relief Plaintiffs seek and would be redressed by a favorable decision by this Court. For these reasons, Mr. Klyver has standing.

II. Applicants are entitled to intervene as of right

Federal Rule of Civil Procedure 24 establishes the requirements for intervention. To intervene as of right, Rule 24(a)(2) requires prospective intervenors to (1) make a timely motion, (2) identify an interest in the subject of the action, (3) be situated such that “disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest,” and (4) be inadequately represented by existing parties. *Fund for Animals*, 322 F.3d at 731 (internal quotation marks omitted). This Court takes “a liberal approach to intervention.” *Wilderness Soc’y v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000). All four Applicants satisfy each of these elements.

A. Applicants’ motion to intervene is timely

In determining whether an intervention motion is timely, courts consider “all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant’s rights, and the probability of prejudice to those already parties in the case.” *Smoke v. Norton*, 252 F.3d 468, 471

(D.C. Cir. 2001) (quoting *Am. Tel. & Tel. Co.*, 642 F.2d at 1295). Applicants' motion to intervene is timely because the present case is still in its very early stages, and Applicants' participation will not prejudice the existing parties.

Applicants are filing this motion less than a month after Plaintiffs filed their complaint. *Cf. Cty. of San Miguel v. MacDonald*, 244 F.R.D. 36, 38, 46 (D.D.C. 2007) (granting motion to intervene filed more than 90 days after the complaint). None of the existing parties have filed responsive pleadings, substantive motions, or briefs yet. Granting Applicants' motion to intervene at this early stage of the proceedings will not prejudice any party. If the Court grants intervention, Applicants intend to support the efficient adjudication of the case.

B. Applicants and their members have legally protected interests at stake

Rule 24(a) next requires applicants for intervention to possess an interest relating to the property or transaction that is the subject matter of the litigation. Fed. R. Civ. P. 24(a)(2). A finding that a party has "constitutional standing"—as Applicants do, as explained above—"is alone sufficient to establish that [the party] has 'an interest relating to the property or transaction which is the subject of the action.'" *Fund for Animals*, 322 F.3d at 735 (quoting Fed. R. Civ. P. 24(a)(2)); *see also Crossroads*, 788 F.3d at 320 (an applicant that can demonstrate standing "*a fortiori* has an interest relating to the property or transaction which is the subject of the action." (internal quotation marks omitted)). The same factual allegations that support Applicants' standing establish a sufficient interest for intervention. As described above, Applicants have legally cognizable interests in preserving the

Monument's protections and protecting its marine ecosystems and wildlife from the harms of commercial fishing and other extractive activities, and this litigation directly affects those interests. *See supra* at 13-19.

C. If successful, Plaintiffs' action would impair Applicants' interests

An applicant for intervention as of right must be "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2) (emphasis added). Applying this requirement, the Court should "look[] to the 'practical consequences' of denying intervention." *Fund for Animals*, 322 F.3d at 735 (internal quotation marks omitted). A "possibility" of impairment of Applicants' interests as a practical matter is sufficient. *Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981).

Applicants satisfy this criterion. If the Court awards Plaintiffs the remedies they seek in this case, the Monument protections for which Applicants have worked extensively and that directly benefit Applicants' members would be lost. This result would harm the scientific, educational, aesthetic, and recreational interests of Applicants' members, and it would undermine the accomplishment of Organizational Applicants' longstanding missions of protecting fragile ocean ecosystems. *Cf. Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1253-54 (10th Cir. 2001) (conservation groups permitted to intervene as of right to defend President Clinton's designation of Grand Staircase Escalante National Monument because the Monument "provides greater protection for the intervenors' interests than prior" land management plans). Because Applicants are so situated that the disposition of

this action may, as a practical matter, impair their ability to protect their own and their members' interests in safeguarding the fragile ecosystems in the Monument, Applicants satisfy Rule 24(a)'s impairment-of-interest requirement.

D. Applicants' interests may not be adequately represented by Federal Defendants

Finally, an applicant for intervention as a matter of right must show that its interests may not be adequately represented by the existing parties to the litigation. This requirement is "not onerous." *Fund for Animals*, 322 F.3d at 735 (internal quotation marks omitted). It merely requires that "the applicant show that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Id.* (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (emphasis added)). An applicant "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee[.]" *Id.* (quoting *Am. Tel. & Tel. Co.*, 642 F.2d at 1293).

None of the current parties adequately represents Applicants' particular and specific interests in this matter. As defendant-intervenors, Applicants would be nominally aligned with the Federal Defendants, but the D.C. Circuit "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Id.* at 736; *see also Crossroads*, 788 F.3d at 317-18, 321 (explaining that the existence of different governmental and private interests supports intervention); *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986) (same). Here, the Federal Defendants represent more general interests, which

differ in important respects from the specific conservation interest of Applicants and their members. *See Dimond*, 792 F.2d at 192-93; *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 70 (D.D.C. 2006); *People for the Ethical Treatment of Animals v. Babbitt*, 151 F.R.D. 6, 8 (D.D.C. 1993). This Court regularly grants motions to intervene by nonprofit conservation organizations in similar suits against the federal government brought to remove or alter environmental protections. *See, e.g., Fed. Forest Res. Coal. v. Vilsack*, 100 F. Supp. 3d 21, 33 (D.D.C. 2015); *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 185 (D.D.C. 2014).

Further, the interests of a governmental party and a seemingly aligned prospective intervenor “might diverge during the course of litigation.” *Fund for Animals*, 322 F.3d at 736. Therefore, even where “there may be a partial congruence of interests, that does not guarantee the adequacy of representation.” *Id.* at 736-37 (granting intervention). This can be particularly true during times of transition between presidential administrations, when the chances of policy shifts are higher. *See, e.g., Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1107 (9th Cir. 2002) (in granting intervention of right to conservation groups, noting Bush Administration stopped defending challenge to Roadless Rule promulgated by Clinton Administration), *abrogated on other grounds by Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998) (finding inadequacy of representation in part because “it is not realistic to assume that the agency’s programs will remain static or unaffected by unanticipated policy shifts”). President Obama designated this Monument in

2016, and it is unclear whether the Trump Administration will support it or other prior presidents' monument designations. In his Senate confirmation hearing, Interior Secretary Zinke, a defendant in this lawsuit, suggested the new Administration might reconsider some of former President Obama's monument designations, opining that "[i]t will be interesting to see whether the President has the authority to nullify a monument."² At the least, even if their substantive positions do not diverge, Applicants will "likely . . . serve as a vigorous and helpful supplement to [the federal government]'s defense." *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977). Given the minimal showing necessary to find inadequate representation, Applicants clearly satisfy this final criterion.

For the foregoing reasons, the Court should grant Applicants' motion to intervene as of right.

III. Alternatively, the Court should permit Applicants to intervene permissively

If the Court denies intervention as of right, Applicants request leave to intervene under Rule 24(b). Permissive intervention is appropriate when an applicant's timely defense "shares a question of law or fact in common with the underlying action and if the intervention will not unduly delay or prejudice the rights of the original parties." *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004) (citing Fed. R. Civ. P. 24(b)), *abrogated on other grounds by Republic of Iraq v. Beatty*, 556 U.S. 848 (2009); *see also Equal Emp't Opportunity Comm'n v. Nat'l*

² Senate Confirmation Hearing for Ryan Zinke at 1:11:37 to 1:13:35 (Jan. 17, 2017), at <https://www.c-span.org/video/?421718-1/ryan-zinke-says-will-address-sexual-assault-allegations-interior&start=4285>.

Children's Ctr., Inc., 146 F.3d 1042, 1046 (D.C. Cir. 1998) (requiring applicants for permissive intervention to present “(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action.”). Applicants satisfy the criteria for permissive intervention.

First, Applicants do not seek to raise new claims or expand the scope of the Court's subject matter jurisdiction, so they need not establish an independent jurisdictional basis for their intervention.

Second, as demonstrated above, Applicants' motion is timely: the case is at a preliminary stage, and no substantive motions or briefs have been filed. Applicants do not assert any new claims. They intend to oppose Plaintiffs' claims and requests for relief and to offer defensive arguments, all of which necessarily share questions of law and fact in common with the central issues in this case. Applicants' involvement will cause no undue delay or prejudice to the parties. If the Court grants intervention, Applicants intend to support the efficient adjudication of the case.

Third, as demonstrated in the proposed answer, Applicants' sole affirmative defense is that Plaintiffs' complaint fails to state a claim upon which relief can be granted, which turns entirely on questions of law and fact that are already at issue in the litigation. *See* Proposed Answer at 12 (Affirmative Defense). Applicants' involvement in the case would inject no new issues of law or fact that have not already been raised by Plaintiffs' complaint.

Applicants therefore meet the criteria for permissive intervention. Further, Applicants submit that their intervention would provide the Court with a critical and as yet unrepresented perspective on the issues and legal questions at the heart of this case. Applicants have deep subject-matter expertise in ocean protection generally and in the Northeast Canyons and Seamounts in particular, and NRDC, CLF, and Mr. Klyver were involved in the lengthy stakeholder process that culminated in President Obama's designation of the Monument. *See id.* at ¶¶ 93-94, 98-99, 107-08, 112-15. Organizational Applicants also have legal expertise and a strong institutional interest in the proper interpretation of the President's authority under the Antiquities Act. In fact, NRDC intervened as defendant in a similar challenge to a presidential monument designation. *Mountain States Legal Found. v. Bush*, No. 00-2072 (D.D.C. Nov. 16, 2001) (unpub.) (dismissing plaintiffs' complaint for failure to state a claim), *aff'd*, 306 F.3d 1132 (D.C. Cir. 2002).

Given the importance of the issues involved in this case, Applicants' stake in preserving the Monument's protections, and the early stage of the litigation, the Court should at a minimum allow permissive intervention.

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CONCLUSION

For the reasons set forth above, Applicants Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and R. Zack Klyver request that the Court grant their motion to intervene as of right or, in the alternative, to intervene permissively. Pursuant to Local Civil Rule 7(j), Applicants have lodged a proposed answer with this motion to intervene.

Dated: March 29, 2017

Respectfully submitted,

/s/ Aaron Colangelo

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Privileged and confidential
Attorney-client communication and attorney work product

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2017, I electronically filed the foregoing Memorandum in Support of Defendant-Intervenor Applicants' Motion to Intervene with the Clerk of the District Court using the CM/ECF system, which will send notification of such filing to counsel of record in this proceeding.

Dated: March 29, 2017

/s/ Aaron Colangelo

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**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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ASSOCIATION, 8 Otis Place, Scituate,
Massachusetts 02066,

ATLANTIC OFFSHORE LOBSTERMEN'S
ASSOCIATION, 221 Third Street, Newport, Rhode
Island 02840,

LONG ISLAND COMMERCIAL FISHING
ASSOCIATION, P.O. Box 191, Montauk, New York
11954,

GARDEN STATE SEAFOOD ASSOCIATION, 212
West State Street, Trenton, New Jersey 08608, and

RHODE ISLAND FISHERMEN'S ALLIANCE,
P.O. Box 337, East Greenwich, Rhode Island 02818,

Plaintiffs,

v.

WILBUR ROSS, in his official capacity as
Secretary of Department of Commerce, 1401
Constitution Avenue, N.W., Washington, D.C.
20230,

BENJAMIN FRIEDMAN, in his official capacity as
Deputy Undersecretary for Operations for the
National Oceanic and Atmospheric Administration,
1401 Constitution Avenue N.W., Room 5128,
Washington, D.C. 20230,

RYAN ZINKE, in his official capacity as Secretary
of the Department of the Interior, 1849 C Street,
N.W., Washington, D.C. 20240,

DONALD J. TRUMP, in his official capacity as
President of the United States, 1600 Pennsylvania
Avenue N.W., Washington, D.C. 20006, and

JANE DOE, in her official capacity as Chairman

Case No. 17-cv-00406 (JEB)

**[Proposed] Answer in
Intervention of
Defendant-Intervenors
Natural Resources
Defense Council,
Conservation Law
Foundation,
Center for Biological
Diversity, and R. Zack
Klyver**

for the Council on Environmental Quality, 722
Jackson Place, N.W., Washington, D.C. 20506,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL,
INC., 40 West 20th Street, 11th Floor, New York,
New York 10011,

CONSERVATION LAW FOUNDATION, 62
Summer Street, Boston, Massachusetts 02110,

CENTER FOR BIOLOGICAL DIVERSITY, 378 N.
Main Avenue, Tucson, Arizona 85701, and

R. ZACK KLYVER, 25 Federal Street, Bar Harbor,
Maine 04609,

Defendant-Intervenor Applicants.

[PROPOSED] ANSWER IN INTERVENTION

Defendant-Intervenors Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and R. Zack Klyver (collectively, Intervenor(s)), through counsel, answer the complaint in this case dated March 7, 2017, as follows. The numbered paragraphs below correspond to the numbered paragraphs in the complaint. Intervenor(s) deny each and every allegation in the complaint that is not specifically admitted, answered, or otherwise responded to in this Answer.

1. Admit that the Antiquities Act of 1906 authorizes the President to designate national monuments, and that the Act as originally enacted contained the quoted phrases. Deny any remaining allegations as Plaintiffs' characterization of the Antiquities Act and aver that the Act's contents are contained in the Act itself.

2. Admit that on September 15, 2016, President Obama designated an approximately 5,000 square mile area in the Atlantic Ocean 130 miles southeast of Cape Cod as the "Northeast Canyons and Seamounts Marine National Monument." Admit that the Proclamation prohibits commercial fishing within the Monument's boundaries, except for lobster and red crab fishing, which may be permitted for another seven years. Deny that this area has been "an important commercial fishery for decades." Deny the remaining allegations as Plaintiffs' characterization of the President's Proclamation and aver that the contents of the Proclamation are identified in the Proclamation itself.

3. Deny.

4. The allegations describe Plaintiffs' requested relief in this case, to which no response is required. To the extent the allegations suggest that Plaintiffs are entitled to such relief, deny.

5. The allegations state legal conclusions to which no response is required. To the extent a response is required, Intervenor's lack knowledge or information sufficient to form a belief, and therefore deny.

6. The allegations state legal conclusions to which no response is required. To the extent a response is required, admit.

7. Lack knowledge or information sufficient to form a belief, and therefore deny.

8. Lack knowledge or information sufficient to form a belief, and therefore deny.

9. Lack knowledge or information sufficient to form a belief, and therefore deny.

10. Lack knowledge or information sufficient to form a belief, and therefore deny.

11. Lack knowledge or information sufficient to form a belief, and therefore deny.

12. Lack knowledge or information sufficient to form a belief, and therefore deny.

13. Lack knowledge or information sufficient to form a belief, and therefore deny.

14. Admit.

15. Aver on information and belief that the Commerce Secretary's full name is Wilbur L. Ross, Jr. Deny the remaining allegations as Plaintiffs' characterization of the President's Proclamation and aver that the contents of the Proclamation are identified in the Proclamation itself.

16. Aver on information and belief that Benjamin Friedman is the Deputy Undersecretary for Operations for the National Oceanic and Atmospheric Administration (NOAA), and that he is performing the duties of NOAA

Administrator. Admit that Plaintiffs name Mr. Friedman as a defendant in his official capacity, and that the Proclamation charges NOAA with Monument management responsibilities. For all remaining allegations, Intervenor lack knowledge or information sufficient to form a belief, and therefore deny.

17. Deny, except admit that Ryan Zinke is the Secretary of the Interior, that Plaintiffs name Mr. Zinke as a defendant in his official capacity, and that the Secretaries of Commerce and of the Interior are required to issue a joint management plan for the Monument.

18. Lack knowledge or information sufficient to form a belief, and therefore deny. Admit that the position of Chairman for the Council on Environmental Quality is vacant.

19. Admit that Congress enacted the Antiquities Act in 1906. Deny all remaining allegations.

20. Admit that the quoted phrases appear in the Antiquities Act. Deny the remaining allegations as Plaintiffs' characterization of the Antiquities Act and aver that the Act's contents are contained in the Act itself.

21. Deny the allegations as Plaintiffs' characterization of the cited court decision and aver that its contents are contained in the decision itself.

22. Deny the allegations as Plaintiffs' characterizations of the Antiquities Act and the cited court decision, and aver that their contents are contained in the Act and the decision themselves.

23. Deny the allegations regarding the Antiquities Act and the cited court decision as Plaintiffs' characterizations of these documents, and aver that their contents are contained in the Act and the decision themselves. Deny all remaining allegations on the basis that the allegations are too vague to permit an answer or state legal conclusions to which no response is required. To the extent a response is required, deny.

24. Deny the allegations as Plaintiffs' characterization of the Antiquities Act and aver that the Act's contents are contained in the Act itself. Deny all remaining allegations.

25. The allegations state legal conclusions to which no response is required. To the extent a response is required, deny.

26. Deny all remaining allegations on the basis that the allegations are too vague to permit an answer or they state legal conclusions to which no response is required. To the extent a response is required, deny.

27. The allegations state legal conclusions to which no response is required. To the extent a response is required, deny.

28. Admit that Congress has exercised its authority to regulate in the U.S. Exclusive Economic Zone to protect the environment. Deny the remaining allegations on the basis that they are too vague to permit an answer.

29. Admit that in 1972 Congress enacted the National Marine Sanctuaries Act. Deny the remaining allegations as Plaintiffs' characterization of the Act and aver that its contents are contained in the Act itself.

30. Admit that in 1976 Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act. Deny the remaining allegations as Plaintiffs' characterization of the Act and aver that its contents are contained in the Act itself.

31. Deny that regional fishery management councils prepare an annual stock assessment for each species commercially harvested in a fishery. Deny that regional fishery management councils set an annual catch limit for every species that is overfished. Deny the remaining allegation on the basis that it is too vague to permit an answer.

32. Deny. Aver that regional fishery management councils have the authority to recommend management measures that regulate fishing gear. Deny the remainder of the allegation on the basis that it is too vague to permit an answer.

33. Deny the allegations as Plaintiffs' characterization of the referenced statutes and aver that their contents are contained in the statutes themselves.

34. Admit.

35. Admit.

36. Lack knowledge or information sufficient to form a belief regarding the allegations, and therefore deny.

37. Deny the allegations on the basis that the allegations are too vague to permit an answer.

38. Deny.

39. Deny, except admit that the area within the Monument is a rich ecosystem that supports whales, sharks, sea turtles and other species.

40. Admit the allegations in the first sentence. Deny the remaining allegations on the basis that they are too vague to permit an answer.

41. Admit.

42. Lack knowledge or information sufficient to form a belief regarding the allegations, and therefore deny.

43. Admit that the New England Fishery Management Council has jurisdiction to manage fisheries on Georges Bank. Lack knowledge or information sufficient to form a belief regarding the allegation in the second sentence, and therefore deny. Deny that the Council enforces catch limits, and deny the remaining allegations in sentence three on the basis that the allegations are too vague to permit an answer.

44. Deny the allegations in the first sentence. Lack knowledge or information sufficient to form a belief regarding the allegation in the second and third sentences, and therefore deny. Deny the remaining allegations on the basis that they are too vague to permit an answer.

45. Deny the allegations on the basis that they are too vague to permit an answer.

46. Deny the allegations on the basis that the allegations are too vague to permit an answer.

47. Lack knowledge or information sufficient to form a belief regarding the allegations, and therefore deny. Deny the allegations as Plaintiffs' characterization of the referenced letter and aver that its contents are contained in the letter itself.

48. Deny the allegations as Plaintiffs' characterization of Governor Baker's letter and aver that its contents are contained in the letter itself.

49. Lack knowledge or information sufficient to form a belief regarding the allegations, and therefore deny. Deny the allegations as Plaintiffs' characterization of the referenced letter and aver that its contents are contained in the letter itself.

50. Deny the allegations as Plaintiffs' characterization of the referenced letter and aver that the Proclamation's contents are contained in the letter itself.

51. Deny the allegations as Plaintiffs' characterization of the referenced letter and aver that the Proclamation's contents are contained in the letter itself.

52. Admit.

53. Admit.

54. Admit.

55. Admit.

56. Deny the allegations in the first sentence as Plaintiffs' characterization of the Proclamation, and aver that the Proclamation's contents are contained in the Proclamation itself. Admit that the Monument area includes sharks, whales, turtles, and highly migratory fish.

57. Deny the allegations as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself.

58. Deny the allegations as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself.

59. Admit that the Proclamation directs the Secretaries of Commerce and of the Interior to manage the Monument and prepare a joint management plan within three years of the date of the Proclamation. Deny the remaining allegations as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself.

60. Deny the allegations as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself.

61. Deny the allegations as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself.

62. Deny the allegations as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself.

63. Admit the allegation in the first sentence that the Proclamation's prohibition on commercial fishing, except for lobster and red crab, went into effect on November 14, 2016. Lack knowledge or information sufficient to form a belief regarding the remaining allegations, and therefore deny.

64. Lack knowledge or information sufficient to form a belief regarding the allegations, and therefore deny.

65. The allegation states legal conclusions to which no response is required. To the extent a response is required, deny.

66. Lack knowledge or information sufficient to form a belief regarding the allegations, and therefore deny.

67. The allegation states legal conclusions to which no response is required. To the extent a response is required, deny.

68. The allegation states legal conclusions to which no response is required. To the extent a response is required, deny.

69. The allegation states legal conclusions to which no response is required. To the extent a response is required, deny.

70. Deny the allegations as Plaintiffs' characterization of the Antiquities Act and aver that the Act's contents are contained in the Act itself.

A. The heading states legal conclusions to which no response is required. To the extent a response is required, deny.

71. Deny the allegation contained in the first sentence as Plaintiffs' characterization of the Proclamation and aver that the Proclamation's contents are contained in the Proclamation itself. Deny the allegations contained in the second and third sentences.

B. The heading states legal conclusions to which no response is required. To the extent a response is required, deny.

72. Deny.

73. Deny.

74. Deny.

75. Deny the allegations contained in the first sentence. Deny the allegations contained in the remaining sentences as Plaintiffs' characterization of the Antiquities Act and the cited court decision, and aver that the Act's and the decision's contents are contained in the Act and the decision themselves.

AFFIRMATIVE DEFENSE

First Defense

The Complaint fails to state a claim upon which relief may be granted.

AVERMENTS

Intervenors aver as follows:

The Monument

76. Approximately 130 miles off the coast of Cape Cod, Massachusetts, lies a cluster of four extinct undersea volcanoes (known as seamounts) and three undersea canyons, each one deeper than the Grand Canyon, that cut into the continental shelf. The dramatic terrain of these canyons and seamounts, the current patterns and biological richness of the water column ecosystems created by these features, and a wide diversity of marine habitats all combine to generate a unique three-dimensional biologic hotspot that offers food, shelter, and nursery habitat to an exceptional range of endemic and migratory sea life in an otherwise austere environment.

77. For scientists, the area is of unique, significant, and continuing interest, populated with rare lifeforms, novel ecological relationships, and unusual geological phenomena. Although the canyons and seamount area has a storied history of scientific exploration and has been the focus of intense scientific investigation and study over the last half decade, scientists are only beginning to discover the wealth of biodiversity found here.

78. So far, scientists have found many different species of cold-water corals and other invertebrates living on the New England Seamounts and in the Atlantic canyons, including species that have been found nowhere else on earth. *See* U.S. Dep't of the Interior, "Press Release: Secretaries Pritzker, Jewell Applaud President's Designation of Northeast Canyons and Seamounts Marine National Monument" (Sept. 15, 2016), at <https://www.doi.gov/pressreleases/secretaries-pritzker-jewell-applaud-presidents-designation-northeast-canyons-and>.

79. The area also hosts endangered sea turtles, sperm and beaked whales, and numerous species of seabirds, fish, and invertebrates.

80. These deep-sea ecosystems are highly vulnerable to the types of damage caused by commercial fishing, seismic surveying, oil and gas drilling, and mining. Deep-sea organisms tend to have longer lifespans and slower growth rates than their shallow-water counterparts, making it difficult for them to recover from human disturbances.

81. One pass of a large weighted trawl net (so-called bottom trawling) scraping along a canyon wall or the lowering and retrieving of heavy offshore crab

or lobster pots, for example, can destroy corals that have been growing for hundreds or thousands of years.

82. Higher in the water column, small whales, dolphins, seabirds, and sea turtles can get caught in so-called longlines, which can extend thirty miles with thousands of hooks intended to catch swordfish and tuna.

83. The Monument is an important feeding ground for a myriad of other species including seabirds such as puffins, gulls, shearwaters, storm petrels, gannets, skuas, and terns; pelagic species including whales, dolphins, and turtles; and migratory fish such as tuna and sharks. Some of these species (such as puffins and whales) spend portions of the year feeding in or traveling through the Monument area, and they rely on the Monument area as a source of shelter and food.

84. Powerful currents created by the canyons lift nutrients to the surface, fueling plankton growth. This explosion of plankton, the base of the food chain, attracts schools of small fish and the larger animals that prey on them. The entire ecosystem from the ocean floor to the ocean surface is of great scientific interest.

85. The ruggedness of the terrain and the depth of the canyons and seamounts have so far kept these ecosystems largely out of the reach of extractive industries. For example, on information and belief, only approximately a half-dozen boats currently fish for lobsters or crabs in the Monument. However, as technology advances and the world's hunger grows for seafood, fossil fuels, and rare minerals, geography alone will not be enough to protect this area.

86. The Intervenors—together with a large coalition of stakeholders including the Pew Charitable Trusts, the Mystic and New England Aquariums, state and local political officials, over a hundred scientists, and numerous businesses, faith leaders, and recreational fishermen—called on the Obama Administration to confer permanent protection on the canyons and seamounts area.

87. There was broad support for the Monument from scientists, members of the public, coastal businesses, recreational fishermen, faith-based leaders, federal and state representatives, the region's two leading aquariums, local conservation organizations, and others.

88. Senator Richard Blumenthal and the entire Connecticut congressional delegation supported monument designation and submitted a formal proposal that encompassed seven major canyons and four seamounts.

89. The Obama Administration considered these requests for permanent protection of the canyons and seamounts, as well as opposing views, in an extensive year-long public process that included a public meeting in September 2015, several rounds of regional stakeholder meetings, including with commercial fishing interests and Intervenors, and the opportunity to submit public comments through a web portal that was available for more than a year.

90. The Obama Administration ultimately received more than 300,000 comments and letters in support of the monument designation, including letters from Intervenors.

The Intervenor

91. The Natural Resources Defense Council (“NRDC”) is a non-profit environmental membership organization with hundreds of thousands of members nationwide, including tens of thousands of members in states along the northeastern Atlantic seaboard.

92. NRDC’s mission is to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends.

93. Through its Oceans Program, NRDC has demonstrated a longstanding commitment to the protection of vulnerable marine ecosystems. For more than three decades, NRDC has advocated for the protection and long-term sustainability of our ocean resources on behalf of its members. A central part of NRDC’s mission is to protect the nation’s seas from pollution and exploitation and to conserve ocean natural treasures.

94. NRDC has worked to prevent and combat damage from extractive activities (including harmful fishing practices) in the Monument area and elsewhere in the Atlantic Ocean, and it advocated for the creation of the Monument on behalf of its members.

95. Among NRDC’s members are scientists, recreational fishermen, and bird- and wildlife-watchers who travel to, use, and enjoy the area in and around the Monument for scientific study, education, wildlife viewing, aesthetic appreciation, and recreational fishing. NRDC’s members also use and enjoy resources outside the Monument’s boundaries that benefit from its protections; for example, NRDC

members who participate in whale- and bird-watching trips enjoy viewing sperm whales, migratory fish, and Atlantic puffins that rely on the Monument area for food, shelter, and migration purposes.

96. The Monument designation benefits their interests by protecting this area from the disruption and damage caused by commercial extractive activities, preserving the health, beauty, and research values of the ecosystems found here, and enabling NRDC's members to study, view, and enjoy the Monument area and the wildlife it supports in their largely pristine state.

97. The Conservation Law Foundation is ("CLF") is a private, not-for-profit organization dedicated, *inter alia*, to protecting marine wildlife and their habitats as well as other coastal and ocean resources in New England.

98. To further these goals, CLF undertakes litigation and other legal advocacy on behalf of its members' interests; educates its members on conservation issues and on threats, challenges, and solutions to New England's oceans so that they can exercise their rights and protect their interests in those resources; promotes public awareness; education, and citizen involvement in the conservation of marine wildlife and resources; and supports programs for the conservation of marine wildlife and their habitats.

99. On behalf of its members, CLF has worked intensively in the Atlantic Ocean in the vicinity of the Monument to prevent and combat damage from extractive activities (including harmful fishing practices), and it advocated for the creation of the Monument.

100. CLF has thousands of members in New England coastal states. CLF's members use and enjoy fish and other marine resources off the New England coasts for recreational, educational, and scientific purposes.

101. CLF's members have a particular interest in landscape-scale marine protection of scientifically important places in the ocean off New England, such as the Monument, because such areas increase the ocean's resilience to the stresses and changes associated with excessive human carbon emissions and serve as scientific reference sites.

102. CLF has members who are professional scientists who have been engaged for years in longitudinal marine resource science in the areas within and many of the animals associated with the Monument and nearby.

103. At least one of CLF's members has a professional interest in using the Monument area as a reference and control site to study the regional changes to marine wildlife associated with climate change in areas not subjected to commercial fishing and other extractive activities.

104. CLF also has members who plan paid offshore pelagic bird-watching trips to areas inside the Monument boundaries and its vicinity to observe offshore seabirds. These members' interest in these trips has been heightened by the creation of the Monument and they want to continue planning and participating in observation trips in the Monument. These members are interested in having an area where seabirds can forage and overwinter with minimum human disturbances.

105. The Monument designation benefits CLF's members' interests by protecting this area from the disruption and damage caused by commercial fishing and other commercial extractive activities, by preserving the health and beauty of the ecosystems found here for future study and scientific research, and by enabling CLF's members to study, view, and enjoy the Monument as the only large marine protected area off New England's shores.

106. The Center for Biological Diversity ("the Center") is a non-profit environmental organization whose primary mission is to ensure the long-term health and viability of animal and plant communities around the world and to protect both the natural world and humans from environmental harms.

107. The Center has devoted considerable resources to ensuring the conservation and sound management of numerous marine species threatened by destructive activities in our oceans, including unsustainable fishing practices and offshore oil and gas exploration, development, and production.

108. Center members and staff regularly use the northwest Atlantic Ocean, including areas within and near the Monument, to view and study marine wildlife, including humpback, sperm, fin, and sei whales; loggerhead and leatherback turtles; sharks and other fish; and seabirds.

109. Commercial fishing, seismic exploration, oil and gas development, and mineral extraction harm many of the marine wildlife species that Center members enjoy viewing and studying, decreasing their likelihood of viewing these species in the wild.

110. Center members and staff regularly participate in agency decision-making that affects marine life in the Atlantic Ocean. The Monument designation provides Center members and staff with the opportunity to participate in agency decision-making affecting marine life in the northwest Atlantic Ocean and with scientific information to use in their advocacy efforts, including comments on agency decision-making affecting marine life in the northwest Atlantic Ocean.

111. R. Zack Klyver is the Head Naturalist for Bar Harbor Whale Watch Co., located in Bar Harbor, Maine.

112. Mr. Klyver has guided over 3,000 trips and taken over a half million passengers to see the whales, seabirds, and other marine wildlife of the northwest Atlantic Ocean.

113. Mr. Klyver has not visited the waters within the Monument boundaries before, but he has frequently traveled to observe marine wildlife in many different parts of the northwest Atlantic and is considering making a trip to the Monument now that it has been established.

114. Mr. Klyver regularly uses the waters of the northwest Atlantic Ocean to view, study, and educate others about marine wildlife, including wildlife that depends upon the Monument as habitat and feeding ground, such as humpback, sperm, fin, and sei whales, and many seabirds, including the population of Atlantic puffins that nest in the summer on six islands near Bar Harbor and overwinter in the Monument area.

115. The Monument's protections benefit Mr. Klyver's interests in viewing, studying, and educating others about these whales and seabirds by providing them with a stable, protected source of food, shelter, and passage for their migrations and movements, reducing the negative effects of commercial fishing and other extractive activities, and helping to ensure that they maintain healthy populations year after year. Mr. Klyver advocated for the Monument's creation on those grounds.

116. The Monument designation will also facilitate scientific investigation and therefore provide Mr. Klyver with information to use when educating the public, commenting on agency decisions and advising agency decision-makers about marine life in the northwest Atlantic Ocean, as he does frequently in his capacity as a naturalist and as a member of the Atlantic herring advisory panel for the New England Fishery Management Council.

The importance of the Monument's protections to Intervenorors and their members

117. The Monument protects the submarine canyons and seamounts and the natural resources and ecosystems in and around them from a range of destructive and harmful activities, including commercial fishing and oil, gas, or minerals exploration and development.

118. Intervenorors and their members benefit from the Monument and would be harmed by the relief Plaintiffs seek in their complaint.

119. Intervenorors and their members include individuals who want to view, study, and enjoy the aesthetic and recreational benefits of the unique habitat,

corals, and other marine species protected by the Monument. The prohibition on commercial fishing and other extractive activities within the Monument protects and advances the interests of Intervenor and their members. It enables them to use and enjoy the Monument area or resources that benefit from the Monument's protections for their scientific, educational, aesthetic, and recreational purposes without commercial fishing and other prohibited activities impacting the natural environment or harming the marine life that they wish to study, observe, and enjoy.

120. Re-opening the Monument area to commercial fishing would result in bycatch of marine wildlife, increase vessel traffic and noise, damage fragile corals, disturb feeding and foraging seabirds and marine mammals, entangle marine mammals and other sea life in fishing gear, impair the Monument's purposes as a scientific reference site, and modify the area's ecology, such as by depleting forage fish stocks and extracting large numbers of certain fish and other species in certain locations within the Monument area.

121. The Monument's protections are crucial to ensuring the health of endangered and threatened species like whales and puffins. Re-opening the Monument area to commercial fishing would harm these species by disrupting the area on which they depend for overwintering, feeding, and migration. Re-opening the area to commercial fishing could result in the deaths of individual animals and would impact the populations as a whole, reducing their availability to be viewed, studied, and enjoyed. Re-opening the Monument to commercial fishing would decrease the likelihood of successfully viewing these species in the wild.

122. As the effects of climate change and habitat destruction stress marine wildlife, the Monument plays an especially important role in ensuring the ocean's resilience and maintaining healthy fish, marine mammal, and seabird populations in nearby areas of the northwestern Atlantic Ocean.

123. The Monument's protections are also important to enabling scientific study of these ocean areas with a minimum of human disturbances. Re-opening the area to commercial fishing would interfere with scientific investigations of the canyons and seamounts.

124. Re-opening the area to commercial fishing would also make it impossible to use the Monument as a control area for comparative studies of the effects of human disturbances on fragile ecosystems. Scientists, including CLF's members, plan to use the Monument area to better understand the impacts of commercial fishing on similar areas and their coral colonies, and to analyze the ecological and other benefits associated with landscape-scale closed marine areas, of which the Monument is the only one in the Atlantic.

WHEREFORE, Intervenor respectfully request that the Court:

- (A) Dismiss the complaint with prejudice;
- (B) Enter judgment in favor of Defendants and Intervenor;
- (C) Decline to grant any relief to Plaintiffs; and
- (D) Grant such further relief as the Court deems just and proper.

Dated: March 29, 2017

Respectfully submitted,

/s/ Aaron Colangelo
Aaron Colangelo (D.C. Bar No. 468448)

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Counsel for CBD and Zack Klyver

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2017, I electronically filed the foregoing Proposed Answer in Intervention with the Clerk of the District Court using the CM/ECF system, which will send notification of such filing to counsel of record in this proceeding.

Dated: March 29, 2017

/s/ Aaron Colangelo
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**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MASSACHUSETTS LOBSTERMEN'S
ASSOCIATION, ATLANTIC OFFSHORE
LOBSTERMEN'S ASSOCIATION, LONG ISLAND
COMMERCIAL FISHING ASSOCIATION,
GARDEN STATE SEAFOOD ASSOCIATION, and
RHODE ISLAND FISHERMEN'S ALLIANCE,

Plaintiffs,

v.

WILBUR ROSS, BENJAMIN FRIEDMAN, RYAN
ZINKE, DONALD J. TRUMP, and JANE DOE,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL,
INC., CONSERVATION LAW FOUNDATION,
CENTER FOR BIOLOGICAL DIVERSITY, and R.
ZACK KLYVER,

Defendant-Intervenor Applicants.

Case No. 17-cv-00406 (JEB)

[PROPOSED] ORDER GRANTING MOTION TO INTERVENE

Upon consideration of the motion to intervene filed by Applicants Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and R. Zack Klyver,

IT IS HEREBY ORDERED that the Court grants the motion to intervene.

Dated:

Hon. James E. Boasberg
United States District Judge

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MASSACHUSETTS LOBSTERMEN'S
ASSOCIATION, ATLANTIC OFFSHORE
LOBSTERMEN'S ASSOCIATION, LONG ISLAND
COMMERCIAL FISHING ASSOCIATION,
GARDEN STATE SEAFOOD ASSOCIATION, and
RHODE ISLAND FISHERMEN'S ALLIANCE,

Plaintiffs,

v.

WILBUR ROSS, BENJAMIN FRIEDMAN, RYAN
ZINKE, DONALD J. TRUMP, and JANE DOE,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL,
INC., CONSERVATION LAW FOUNDATION,
CENTER FOR BIOLOGICAL DIVERSITY, and R.
ZACK KLYVER,

Defendant-Intervenor Applicants.

Case No. 17-cv-00406 (JEB)

**CORPORATE DISCLOSURE STATEMENT
FOR THE NATURAL RESOURCES DEFENSE COUNCIL, INC.,
AS REQUIRED BY L. CV. R. 7.1 OF THE LOCAL RULES OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

Pursuant to Federal Rule of Civil Procedure 7.1 and Local Civil Rule 7.1, I,
the undersigned, counsel of record for Defendant-Intervenor Applicant Natural
Resources Defense Council, Inc., certify to the best of my knowledge and belief, that
the Natural Resources Defense Council has no parent companies, subsidiaries, or

affiliates that have issued shares to the public. These representations are made in order that judges of this Court may determine the need for recusal.

Dated: March 29, 2017

Respectfully submitted,

/s/ Aaron Colangelo

Aaron Colangelo (D.C. Bar No. 468448)

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**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MASSACHUSETTS LOBSTERMEN'S
ASSOCIATION, ATLANTIC OFFSHORE
LOBSTERMEN'S ASSOCIATION, LONG ISLAND
COMMERCIAL FISHING ASSOCIATION,
GARDEN STATE SEAFOOD ASSOCIATION, and
RHODE ISLAND FISHERMEN'S ALLIANCE,

Plaintiffs,

v.

WILBUR ROSS, BENJAMIN FRIEDMAN, RYAN
ZINKE, DONALD J. TRUMP, and JANE DOE,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL,
INC., CONSERVATION LAW FOUNDATION,
CENTER FOR BIOLOGICAL DIVERSITY, and R.
ZACK KLYVER,

Defendant-Intervenor Applicants.

Case No. 17-cv-00406 (JEB)

**CORPORATE DISCLOSURE STATEMENT
FOR CONSERVATION LAW FOUNDATION, INC.,
AS REQUIRED BY L. CV. R. 7.1 OF THE LOCAL RULES OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

Pursuant to Federal Rule of Civil Procedure 7.1 and Local Civil Rule 7.1, I,
the undersigned counsel of record for Defendant-Intervenor Applicant Conservation
Law Foundation, Inc., certify to the best of my knowledge and belief, that
Conservation Law Foundation has no parent companies, subsidiaries, or affiliates

that have issued shares to the public. These representations are made in order that judges of this Court may determine the need for recusal.

Dated: March 29, 2017

Respectfully submitted,

/s/ Peter Shelley

Peter Shelley (Mass. BBO #544334)

(application *pro hac vice* pending)

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**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MASSACHUSETTS LOBSTERMEN'S
ASSOCIATION, ATLANTIC OFFSHORE
LOBSTERMEN'S ASSOCIATION, LONG ISLAND
COMMERCIAL FISHING ASSOCIATION,
GARDEN STATE SEAFOOD ASSOCIATION, and
RHODE ISLAND FISHERMEN'S ALLIANCE,

Plaintiffs,

v.

WILBUR ROSS, BENJAMIN FRIEDMAN, RYAN
ZINKE, DONALD J. TRUMP, and JANE DOE,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL,
INC., CONSERVATION LAW FOUNDATION,
CENTER FOR BIOLOGICAL DIVERSITY, and R.
ZACK KLYVER,

Defendant-Intervenor Applicants.

Case No. 17-cv-00406 (JEB)

**CORPORATE DISCLOSURE STATEMENT
FOR THE CENTER FOR BIOLOGICAL DIVERSITY, INC.,
AS REQUIRED BY L. CV. R. 7.1 OF THE LOCAL RULES OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

Pursuant to Federal Rule of Civil Procedure 7.1 and Local Civil Rule 7.1, I,
the undersigned, counsel of record for Defendant-Intervenor Applicant Center for
Biological Diversity, Inc., certify to the best of my knowledge and belief, that the
Center for Biological Diversity has no parent companies, subsidiaries, or affiliates

that have issued shares to the public. These representations are made in order that judges of this Court may determine the need for recusal.

Dated: March 29, 2017

Respectfully submitted,

/s/ Roger M. Fleming

D.C. Bar No. ME0001

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11 *Pro Hac Vice pending

12 Attorneys for Plaintiffs

13 UNITED STATES DISTRICT COURT
14 FOR THE DISTRICT OF COLUMBIA
15

16 MASSACHUSETTS LOBSTERMEN'S)
ASSOCIATION; et al.,)

No. 1:17-cv-00406-JEB

17 Plaintiffs,)

18 v.)

19 WILBUR J. ROSS, JR., in his official capacity as)
20 Secretary of Department of Commerce; et al.,)

21 Defendants.)
22

23 **DECLARATION OF SERVICE VIA CERTIFIED MAIL**

24 I, Tawnda Elling, declare as follows:

25 I am a resident of the State of California, residing or employed in Sacramento, California.

26 I am over the age of 18 years and am not a party to the above-entitled action.

27 My business address is 930 G Street, Sacramento, California 95814.

28 ///

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1 On March 20, 2017, true copies of (1) SUMMONS IN A CIVIL ACTION;
2 (2) COMPLAINT; (3) CIVIL COVER SHEET; (4) NOTICE OF RIGHT TO CONSENT TO
3 TRIAL BEFORE A UNITED STATES MAGISTRATE JUDGE; (5) MOTION FOR ADMISSION
4 PRO HAC VICE FOR JONATHAN WOOD; (6) MOTION FOR ADMISSION PRO HAC VICE
5 FOR TODD F. GAZIANO; (7) MOTION FOR ADMISSION PRO HAC VICE OF DAMIEN M.
6 SCHIFF; (8) MOTION FOR ADMISSION PRO HAC VICE OF JOHANNA B. TALCOTT; and
7 (9) MINUTE ORDERS GRANTING PRO HAC VICE MOTIONS were placed in envelopes
8 addressed to:

9 Wilbur J. Ross, Jr.
10 Secretary
11 Department of Commerce
1401 Constitution Ave. NW
Washington, DC 20230

91 7199 9991 7033 0659 6016

12 Benjamin Friedman
13 National Oceanic and Atmospheric Association
1401 Constitution Ave. NW, Room 5128
Washington, DC 20230

91 7199 9991 7034 0749 0381

14 Ryan Zinke
15 Secretary
16 U.S. Department of Interior
1849 C Street, NW
Washington, DC 20240

91 7199 9991 7034 0749 0398

17 Donald J. Trump, President of the United States
18 c/o Jeff Sessions
19 U.S. Attorney General
U.S. Department of Justice
20 950 Pennsylvania Ave., NW
Washington, DC 20530-0001

91 7199 9991 7034 0749 0374

21 Channing D. Phillips
22 U.S. Attorneys Office
23 555 4th Street NW
Washington, DC 20530
Attn: Civil Process Clerk

91 7199 9991 7034 0749 0367

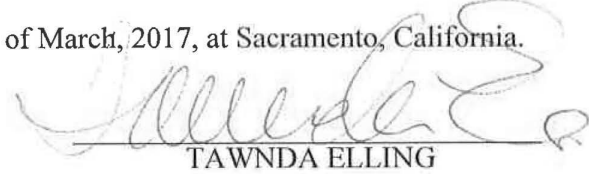
24 which envelopes, with postage thereon fully prepaid, were then sealed and mailed via certified mail
25 at a United States Post Office in Sacramento, California.

26 ///

27 ///

28 ///

1 I declare under penalty of perjury that the foregoing is true and correct and that this
2 declaration was executed this 20th day of March, 2017, at Sacramento, California.

3
4 
TAWNDA ELLING

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

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Date: March 30, 2017

Tawnda Elling:

The following is in response to your March 30, 2017 request for delivery information on your Certified Mail™ item number 9171999991703306596016. The delivery record shows that this item was delivered on March 22, 2017 at 11:35 am in WASHINGTON, DC 20230. The scanned image of the recipient information is provided below.

Signature of Recipient :

A handwritten signature in black ink that reads "Byron Cele".

Address of Recipient :

A handwritten address in black ink that reads "20230".

Thank you for selecting the Postal Service for your mailing needs.

If you require additional assistance, please contact your local Post Office or postal representative.

Sincerely,
United States Postal Service



Date: March 30, 2017

Tawnda Elling:

The following is in response to your March 30, 2017 request for delivery information on your Certified Mail™ item number 9171999991703407490381. The delivery record shows that this item was delivered on March 22, 2017 at 11:35 am in WASHINGTON, DC 20230. The scanned image of the recipient information is provided below.

Signature of Recipient :

A handwritten signature in black ink that reads "Byron Cele".

Address of Recipient :

A handwritten address in black ink that reads "20230".

Thank you for selecting the Postal Service for your mailing needs.

If you require additional assistance, please contact your local Post Office or postal representative.

Sincerely,
United States Postal Service



Date: March 30, 2017

Tawnda Elling:

The following is in response to your March 30, 2017 request for delivery information on your Certified Mail™ item number 9171999991703407490398. The delivery record shows that this item was delivered on March 22, 2017 at 11:41 am in WASHINGTON, DC 20240. The scanned image of the recipient information is provided below.

Signature of Recipient :

A handwritten signature in black ink, appearing to read "J/oxns".

Address of Recipient :

A handwritten address in black ink, appearing to read "20240".

Thank you for selecting the Postal Service for your mailing needs.

If you require additional assistance, please contact your local Post Office or postal representative.

Sincerely,
United States Postal Service

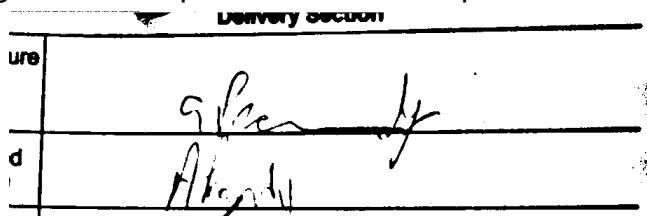


Date: March 30, 2017

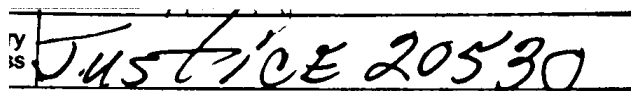
Tawnda Elling:

The following is in response to your March 30, 2017 request for delivery information on your Certified Mail™ item number 9171999991703407490374. The delivery record shows that this item was delivered on March 23, 2017 at 5:25 am in WASHINGTON, DC 20530. The scanned image of the recipient information is provided below.

Signature of Recipient :



Address of Recipient :



Thank you for selecting the Postal Service for your mailing needs.

If you require additional assistance, please contact your local Post Office or postal representative.

Sincerely,
United States Postal Service

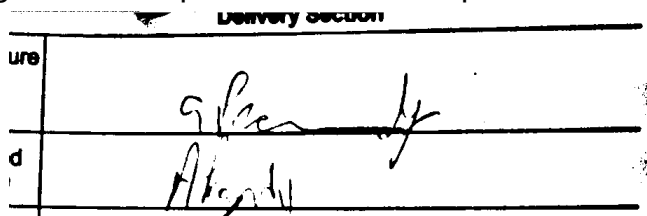


Date: March 30, 2017

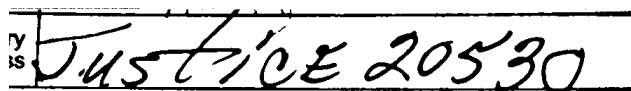
Tawnda Eling:

The following is in response to your March 30, 2017 request for delivery information on your Certified Mail™ item number 9171999991703407490367. The delivery record shows that this item was delivered on March 23, 2017 at 5:25 am in WASHINGTON, DC 20530. The scanned image of the recipient information is provided below.

Signature of Recipient :



Address of Recipient :



Thank you for selecting the Postal Service for your mailing needs.

If you require additional assistance, please contact your local Post Office or postal representative.

Sincerely,
United States Postal Service

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MASSACHUSETTS LOBSTERMEN'S)	
ASSOCIATION; et al.,)	No. 1:17-cv-00406-JEB
)	
Plaintiffs,)	
)	
v.)	
)	
WILBUR J. ROSS, JR., in his official)	
capacity as Secretary of Department of)	
Commerce; et al.,)	
)	
Defendants,)	
)	
NATURAL RESOURCES DEFENSE)	
COUNCIL; et al.,)	
)	
Defendant-Intervenor Applicants.)	

PLAINTIFFS' RESPONSE TO MOTION TO INTERVENE

In this case, Plaintiffs Massachusetts Lobstermen's Association, Atlantic Offshore Lobstermen's Association, Long Island Commercial Fishing Association, Garden State Seafood Association, and Rhode Island Fishermen's Alliance (collectively, "Fishermen") challenge the designation of 5,000-square miles of ocean as a monument under the Antiquities Act, which limits monuments to "*land* owned or controlled by the Federal Government." *See* Compl., ECF No. 1, ¶ 2; 54 U.S.C. § 320301 (emphasis added).

On March 19, 2016, the Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and R. Zack Klyver (collectively, "Applicant-Intervenors") moved to intervene in the case to defend the monument

designation, arguing that they have unidentified members with general interests related to the environment and the area. *See* Mot. To Intervene, ECF No. 7.

As explained below, the Applicant-Intervenors have failed to carry their burden of providing “specific facts” establishing their standing to intervene and supporting those facts with affidavits or other evidence. If the Court concludes otherwise, the Fishermen ask it not to decide the motion until the Defendants have an opportunity to weigh in. Alternatively, the Fishermen ask that the Court limit the intervention to prevent Applicant-Intervenors from duplicating Defendants’ arguments, which will unnecessarily tax party and judicial resources.

Argument

I

Applicant-Intervenors Have Not Carried Their Burden of Establishing Standing

To intervene, a party must first establish standing to participate in the litigation. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003); *see also Deutsche Bank Nat’l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013) (requirement to show standing also applies to would-be defendant-intervenors).¹ The

¹ Applicant-Intervenors assert a right to intervene under Federal Rule of Civil Procedure 24(a) and, in the alternative, request permission to intervene under Rule 24(b). The D.C. Circuit has repeatedly held that the standing requirement applies to intervention as of right. *See Fund for Animals*, 322 F.3d at 731-32; *see also Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013); *Military Toxics Project v. EPA*, 146 F.3d 948, 953 (D.C. Cir. 1998); *City of Cleveland v. NRC*, 17 F.3d 1515, 1517 (D.C. Cir. 1994). It has also held that the obligation to prove a basis for jurisdiction is even higher for permissive intervention. *See EEOC v. Nat’l Children’s Ctr., Inc.*,

purpose of this standing requirement is to weed out would-be intervenors who have only a philosophical or policy objection to an issue in a case. *See Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015).

To make this showing, the party must put forth “specific facts” demonstrating that it will (1) suffer a legally cognizable injury (2) caused by the suit in which it seeks to participate and (3) the Court can redress that injury with a favorable ruling. *See Fund for Animals*, 322 F.3d at 731-32; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Applicant-Intervenors have not made the required showing. To establish standing, Applicant-Intervenors cannot rest on “mere allegations, but must set forth by affidavit or other evidence specific facts.” *See Fund for Animals*, 322 F.3d at 733 (quoting *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002)). This burden should apply unless the party is “an object of” a challenged regulation or owns property regulated by it. *See Fund for Animals*, 322 F.3d at 733-34; *see also Lujan*, 504 U.S. at 561-62 (explaining that “there is ordinarily little question” of standing for the object of a regulation but where a party’s alleged injury is based on regulation “of *someone else*, much more is needed”). The D.C. Circuit has upheld the denial of intervention based on the inadequacy of supporting affidavits. *See, e.g., Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1324 (D.C. Cir. 2013); *Agric. Retailers Ass’n v.*

146 F.3d 1042, 1046-47 (D.C. Cir. 1998). Therefore, the failure to establish standing should lead the Court to deny Applicant-Intervenors’ motion under both.

United States Dep't of Labor, 837 F.3d 60, 66 (D.C. Cir. 2016). It would make little sense to deny intervention where a party's affidavits are inadequate but to grant intervention when a party submits no affidavits at all.

None of the Applicant-Intervenors have submitted any affidavits or other evidence of specific facts showing they have standing to participate in this case. They are not the objects of the monument's regulations, the Fishermen are. *See* Pres. Proc. No. 9496, 81 Fed. Reg. 65,161, 65,164-65 (Sept. 15, 2016) ("The Secretar[y] shall prohibit . . . [f]ishing commercially or possessing commercial fishing gear . . . except for the red crab fishery and the American lobster fishery as regulated below."); *see also Sierra Club v. EPA*, 292 F.3d at 900 (noting that standing is "self-evident" when a complainant is the object of a regulation). For that reason, Applicant-Intervenors have failed to carry their burden. *See Fund for Animals*, 322 F.3d at 733-34 (movant bears the burden of establishing the right to intervene).

Applicant-Intervenors cite two cases in support of their argument for a lower standard. The first, *United States v. American Telephone & Telegraph Company*, involved the intervention of a party that owned the property at issue and was therefore within *Fund for Animals*' exception. *See Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980); *Fund for Animals*, 322 F.3d at 733-34. The second case, *Defenders of Wildlife v. Perciasepe*, cuts against Applicant-Intervenors' argument, as it refused to credit speculative general allegations as "specific facts" establishing standing. 714 F.3d at 1327.

Setting aside Applicant-Intervenors' failure to support their standing with affidavits or other evidence, the allegations in their proposed answer are also insufficient because they do not provide the "specific facts" required. Rather, Applicant-Intervenors rest solely on vague, general, and conclusory allegations.

Natural Resources Defense Council, Conservation Law Foundation, and Center for Biological Diversity assert only one basis for standing: associational standing based on at least one member who has individual standing. *See* Mot. To Intervene at 13-17; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Despite relying on a theory that requires Applicant-Intervenors to identify at least one member who has individual standing, their allegations fail to identify any particular individual at all, much less show that member has standing.

Natural Resources Defense Council alleges that it has members who are "scientists, recreational fishermen, and bird- and wildlife-watchers" who use the area within the monument or near it. Proposed Answer ¶ 95. This generic allegation falls far short of the specific facts required to show standing. *Lujan* expressly rejects generic claims that someone has previously visited an area as a basis for standing, requiring instead "concrete plans" describing when a particular individual will visit the area again. 504 U.S. at 564.

The Conservation Law Foundation alleges that it has members who enjoy the marine resources off the New England coasts (though it does not allege that this includes the area within the monument). Proposed Answer ¶ 100. Using the general

vicinity is not enough to satisfy standing. *See Lujan*, 504 U.S. at 565-66 (“[A] plaintiff claiming injury from environmental damage must use the area affected . . . and not an area roughly ‘in the vicinity’ of it.”).

Conservation Law Foundation also vaguely alleges that some of its members are scientists who have studied the resources within the area or nearby. Proposed Answer ¶ 102. Allegedly, one member “has a professional interest” in perhaps someday using the area to study climate change, though that person is not identified and Conservation Law Foundation does not state that the unidentified person has any current concrete plans to begin this study in the immediate future. *Id.* ¶ 103. These generic claims that scientists have a professional interest in the species that occupy the area are insufficient, but must have a concrete plan to work in the specific area or with the specific animals that occupy it. *See Lujan*, 504 U.S. at 566-67.

Conservation Law Foundation also asserts that it has members who, because of the monument designation, may someday visit it to watch birds, though it does not identify any such member or indicate that any trips are imminent. Proposed Answer ¶ 104. This allegation falls short of the specific facts required for the same reason as the other allegations above—it does not show that any member has any concrete plans to visit the area at any particular time in the near future. *See Lujan*, 504 U.S. at 564.

The Center for Biological Diversity’s claim to standing rests solely on a generic allegation that its “members and staff regularly use the northwest Atlantic Ocean, including areas within and near the Monument, to view and study marine wildlife[.]”

Proposed Answer ¶ 108. This generic allegation also falls short of the specific facts required for the same reason. *See Lujan*, 504 U.S. at 564.

The only individual identified by Applicant-Intervenors is Mr. Klyver, who moves to intervene in his individual capacity. He, too, does not provide an affidavit or other evidence to show standing. His allegations in the proposed answer, rather than establishing standing, affirmatively disprove it.

Mr. Klyver's allegations acknowledge that he has never been to the area included within the monument nor used it for his whale-watching business. Proposed Answer ¶ 113. He also implicitly acknowledges that he has no concrete plan to visit the area in the future. Instead, he merely alleges that he "is considering" making a trip to the area at some unknown time in the future. *Id.*; *see Lujan*, 504 U.S. at 564. ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").

II

The Court Should Allow Defendants an Opportunity To Weigh In Before Granting the Motion

Applicant-Intervenors were admirably prompt in filing their motion, dispelling any question whether they satisfied one of the factors for intervention—that the motion be timely. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998); Fed. R. Civ. P. 24(a)(2). Their race to the courthouse was so quick that they even beat the Defendants, who have not yet made an appearance and are not required to do so until May 22, 2017.

Although the Fishermen argue that the motion should be denied because Applicant-Intervenors have failed to establish standing, in the alternative, they ask the Court to withhold judgment on the motion until Defendants can be given an opportunity to weigh in. Because Applicant-Intervenors wish to intervene on the side of Defendants, this motion affects them as much as it does the Fishermen. Defendants' participation may prove useful to the Court in determining whether to grant the motion and, if so, what limitations to put on intervenors' participation in this case, without having to rely on Applicant-Intervenors' speculation. *See* Mot. To Intervene at 22-24.

III

Interventions Should Be Limited To Prevent Duplication of Arguments

If the Court grants Applicant-Intervenors' motion, the Fishermen ask that it include in its order a direction that Applicant-Intervenors avoid duplicating Defendants' arguments. As their motion acknowledges, they do not intend to raise any unique claims or issues. *See* Mot. To Intervene at 25. Redundant briefing would unnecessarily tax both party and judicial resources.

Conclusion

Applicant-Intervenors have not carried their burden of demonstrating their standing through "specific facts" supported by affidavits or other evidence. Their generic allegations each fall short of this standard and are inadequate under *Lujan*. For that reason, the motion to intervene should be denied. In the alternative, the Court should give Defendants an opportunity to weigh in on the motion before

deciding it and, if intervention is granted, limit the intervention to prevent unnecessary duplication of arguments.

DATED: April 12, 2017.

Respectfully submitted:

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Arlington, Virginia 22201
Telephone: (202) 888-6881

**Pro Hac Vice*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2017, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Aaron S. Colangelo
acolangelo@nrdc.org

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bsewell@nrdc.org

Michael E. Wall
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Katherine Desormeau
kdesormeau@nrdc.org

Peter Shelley
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Roger Fleming
rfleming@earthjustice.org

Davené D. Walker
davene.walker@usdoj.gov

s/ Jonathan Wood
JONATHAN WOOD

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MASSACHUSETTS LOBSTERMEN'S)	
ASSOCIATION; et al.,)	No. 1:17-cv-00406-JEB
)	
Plaintiffs,)	
)	
v.)	
)	
WILBUR J. ROSS, JR., in his official)	
capacity as Secretary of Department of)	
Commerce, et al.,)	
)	
Defendants,)	
)	
NATURAL RESOURCES DEFENSE)	
COUNCIL, et al.,)	
)	
Defendant-Intervenor Applicants.)	

**[PROPOSED] ORDER DISMISSING DEFENDANT-INTERVENOR
APPLICANTS' MOTION TO INTERVENE**

Before this Court is a Motion to Intervene by the Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and R. Zack Klyver (Applicant-Intervenors), filed on March 30, 2017. Plaintiffs Massachusetts Lobstermen's Association, Atlantic Offshore Lobstermen's Association, Long Island Commercial Fishing Association, Garden State Seafood Association, and Rhode Island Fishermen's Alliance filed a response opposing the Motion to Intervene on April 12, 2017.

DISCUSSION

In addition to satisfying the requirements for intervention under Federal Rule of Civil Procedure 24, any prospective intervenor must establish Article III standing. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003); *see also Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013). To make this showing, the party must put forth “specific facts” demonstrating that it will (1) suffer a legally cognizable injury (2) caused by the suit in which it seeks to participate and (3) the Court can redress that injury with a favorable ruling. *See Fund for Animals*, 322 F.3d at 731-32; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). This burden is lessened only when a party is the object of the regulation at issue. *See Fund for Animals*, 322 F.3d at 731-32; *see also Lujan*, 504 U.S. at 561-62 (explaining that “there is ordinarily little question” of standing for the object of a regulation but where a party’s alleged injury is based on regulation “of *someone else*, much more is needed”).

Applicant-Intervenors are not the object of the regulation at issue. *See Sierra Club v. EPA*, 292 F.3d 895, 900. Despite bearing the burden of putting forth “specific facts” to demonstrate standing, they did not submit affidavits or any other evidence demonstrating their standing to participate in this case. *See Fund for Animals*, 322 F.3d at 731-32. The Applicant-Intervenor organizations also do not identify any members with individual standing, as is required to establish associational standing. *See Lujan*, 504 U.S. 555, 562-63. Moreover, the Applicant-Intervenors’ allegations in their proposed answer are insufficient because they are vague, general, and

conclusory. *See Lujan*, 504 U.S. at 566-67. Applicant-Intervenors' allege that some unidentified member hopes to someday visit the monument for bird or whale watching or scientific research, but no concrete plan for doing any of those things is even alleged.

For the foregoing reasons, the Court holds that Applicant-Intervenors have failed to meet their burdens in establishing standing. It is ORDERED that the Motion to Intervene is DENIED.

DATED: .

JAMES E. BOASBERG
United State District Court Judge

List of counsel and parties to be notified of entry of order:

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DAVENÉ D. WALKER

U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, DC 20044-7611

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2017, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Aaron S. Colangelo
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s/ Jonathan Wood
JONATHAN WOOD